

Notes and Comment

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NOTES AND COMMENT

Contract: Liquidated Damages and Penalties.—Plaintiff, as receiver in sequestration proceedings for The People's Theatre Company, sued to recover \$72,000 deposited as liquidated damages. On March 20, 1911, defendant, Louis Minsky, by a written instrument leased a building, which was to be erected, for a term of ten years with the privilege of renewing the same for another term of eleven years. By the lease the tenants agreed to and did deposit as security for performance of all its terms, \$72,000, which the parties stipulated was to be liquidated damages in the event of a breach. The landlord assigned his interest to the defendant company, and the tenants assigned their interest to The People's Theatre Company. On May 7, 1914, a final order was made awarding the landlord possession of the premises for nonpayment of the rent. The court held, that as the facts showed there was no excessive disproportion between the amount deposited and the actual damages sustained by the owners, and as it was impossible to estimate the actual damages that would be suffered, the deposit should be retained, in case of a breach by the lessee, as liquidated damages. *Stimpson v. Minsker Realty Co.*, 154 N. Y. Supp. 496 (1915).

While the conclusion in the principal case is correct, yet the language used tends to perpetuate the confusion which already exists in this class of cases. The court said, "Under the established rule of law in this state the question as to when a provision for liquidated damages shall in fact be construed as liquidated damages and not as a penalty depends upon the intention of the parties and the nature of the transaction." The court then cites with approval the case of *Caesar v. Rubinson*¹ where the court said, "The character of the deposit, whether liquidated damages or a penalty, depends upon the intention of the parties as disclosed by the situation and by the terms of the instrument. The deposit is not necessarily to be regarded as liquidated damages, although it is expressly so stated in the instrument." A similar statement is found in *Curtis v. Van Bergh*,² as follows: "This question depends upon the intention of the parties which is to be gathered from the language used in making the contract, read in the light of circumstances surrounding them at the time."

What a court means, when it says it will not enforce a penalty, is that it will not permit a punishment to be inflicted on the party for his breach. Courts desire to compensate for a breach of contract and not to punish as in the case of crime or as may be in case of tort. What the court does when it construes a stipulated sum as a penalty is to construe the contract to mean something different from

¹174 N. Y. 492 (1903).

²161 N. Y. 47 (1899), not cited in the principal case.

what the parties intended, by allowing the injured party to recover only actual damages for the breach,³ a result which is nothing more than making a new contract for the parties by nullifying the agreed sum to be paid in case of breach.

We find in these cases, which involve penalties, an exception to the general rule that the intention of the parties to the contract will be carried out. Contracts will not be enforced which are unconscionable and contrary to public policy,⁴ and contracts are unconscionable and contrary to public policy if they punish the party for his breach of contract, instead of compensating the injured party. The confusion could well be avoided if the courts would abandon the expression, "This question depends upon the intent of the parties," and say that they will not enforce a contract for the breach of which a punishment is sought to be inflicted.

Such statement would be in accord with the equitable origin of the rule. By the common law of England, it made no difference whether the sum was liquidated damages or a penalty, and judgment obtained for the sum could be enforced in the common law courts. But, to remedy the hardship upon the party who committed the breach, equity took jurisdiction and decreed that, although judgment could be taken in the common law courts for the penal sum, the injured party could recover only the actual damages sustained and the penal sum was to stand merely as security for the payment by the obligator of the actual damages. The statute, 8 and 9 Wm. 111, was passed to enable the party who committed the breach to secure the same relief at law as he might have obtained before the statute by the aid of the court of equity.⁵ In this country the same result of allowing the injured party to realize only the actual damages in case of a penalty has been reached either by substantially re-enacting the provision of the English statute⁶ or by judicial decision.⁷

Herman B. Lerner, '17.

Contract: Reward: Compliance with Terms.—In a recent Nevada case, *Smith et al v. State*, 151 Pac. Rep. 512 (1915), the governor of the state, being authorized by a statute, offered a reward for the "arrest and conviction" of certain murderers. The plaintiffs in the action, being a posse with authority to arrest, but without knowledge of the offer of the reward, killed the murderers in an attempt to arrest. The court held that the plaintiffs were entitled to recover and that knowledge of the offer of a reward made by the state is an immaterial element with respect to the plaintiffs' right to recover. The court held further that a too technical construction of the terms will not be enforced with respect to the fulfillment of the terms and that substantial performance is all that is necessary. The case presents

³*Hennessy v. Metzger*, 152 Ill. 505 (1894).

⁴*Seymour D. Thompson*, 46 Central Law Journal 5 (1898).

⁵For historical statement as to relief against penalties, see Loyd, "Penalties and forfeitures before *Peachy v. Duke of Somerset*," 29 *Harvard Law Review* 117, 125-129 (Dec., 1915).

⁶Revised Statutes of Maine (1903), chapter 84, sec. 47.

⁷*Hennessy v. Metzger*, *supra*.

two interesting questions; (1) Is knowledge of the offer on the part of the claimant necessary to entitle him to recover, where the reward is offered by the state? (2) When are the terms of an offer of a reward complied with?

In considering the first question the cases may be divided into two classes; (a) where the reward is offered by a private individual; (b) where it is offered by the state. In regard to subdivision (a) the apparent weight of authority, including decisions¹ and text writers,² holds that the offer of a reward is made with the intent to enter into a contract; and that, therefore, knowledge of the offer on the part of the offeree is necessary to entitle him to recover the reward. *Fitch v. Snedaker*, *supra*, expresses the rule in jurisdictions holding this view; "One who gives information or performs an act in ignorance of an offered reward for such information or act cannot recover the reward."

There are jurisdictions, however,³ which hold to the contrary,—that knowledge of the reward offered is immaterial as a condition precedent to recovery. Of course the decisions in these jurisdictions cannot rest upon any principle of true contract, because without knowledge of the offer there can be no acceptance and no meeting of the minds. Therefore, the courts must find some other ground and have adopted a quasi-contractual basis, although it is not expressly so stated. They hold that, the offer being to any person or persons, anyone complying with the terms of the offer becomes entitled to the reward, because the offerer has received the benefit for which he was willing to pay and offered to pay the amount of the reward; that he has no right to inquire into the motive which prompted the claimant to act; and that it is not just that he should have both the benefit and the reward at the expense of the claimant.

Although the argument in these cases does not accord with the idea that the offer of a reward in all cases contemplates a true contractual relationship between the parties, nevertheless these particular cases may find justification upon grounds of public policy. In all of these cases except one,⁵ the reward was offered for the apprehension of a criminal and in that one the reward was offered for the recovery of stolen goods. Therefore, the question arises, whether, even in these jurisdictions, knowledge of the offer might not be required in a case of a strictly private reward, where there is no public interest involved, as for instance, if A were to offer a reward to anyone who would bring him information as to the height of a certain mountain. It would seem that in a case of this kind the

¹*Fitch v. Snedaker*, 38 N. Y. 248 (1868); *Williams v. West Chicago Street R. Co.*, 191 Ill. 610 (1901); *Mayor v. Bailey*, 36 N. J. L. 490 (1873); *Stamper v. Temple*, 6 Humph. (Tenn.) 113 (1845); *Broadnax v. Ledbetter*, 100 Tex. 375 (1907).

²Anson, "Law of Contracts," sec. 29; Story, "Contracts" (5th Ed.), 493; Page, "Contracts," sec. 32; 34 Cyc. 1751.

³*Auditor v. Ballard*, 9 Bush. (Ky.) 572 (1873); *Dawkins v. Sappington*, 26 Ind. 199 (1866); *Eagle v. Smith*, 4 Houst. (Del.) 293 (1891); *Russel v. Stewart*, 44 Vt. 170 (1872); *Gibbons v. Proctor*, 64 L. T. N. S. (Eng.) 594 (1892).

⁴*Williams v. Carwardine*, 4 B. & A. (Eng.) 621 (1833).

⁵*Eagle v. Smith*, *supra*.

offerer might properly be regarded as having contemplated the formation of a true contract, in which event knowledge of the offer on the part of the plaintiff would be a condition precedent to his right of recovery.

Turning now to subdivision (b), where the reward is offered by a state or government, there seems to be greater conflict as to what the law is and ought to be with reference to the requirement of knowledge on the part of the offeree. The principal case holds that knowledge of the offer of a reward is unnecessary to entitle the claimant to recover, when the reward is offered by the state. It would seem that such is the correct construction. The very fact that the reward has been offered by the state would indicate that a matter of public policy is involved; and in such a case it would seem that the legislature, in offering the reward or authorizing a state official to do so, did not contemplate the formation of a true contractual relation, but did intend to create a quasi-contractual statutory liability to pay the reward to any person performing the service required by the offer. The right of recovery was to be absolutely independent of the existence of a true contract; it was to be derived from the force and operation of the statute itself. Under this construction, in order to accomplish the purpose of the statute, that persons be induced to perform such meritorious acts for the benefit of the public, it is necessary for them to know no more than that, if in the particular case a reward has been offered, they will receive it and will not be harrassed by litigation over technicalities in the interpretation and application of the statute by the state. The court in *Auditor v. Ballard*, *supra*, which overruled *Lee v. Flemingsburg*⁶ said, "Is it not well that all may know that whoever in a community has it in his power to prevent the final escape of a fugitive from justice and does prevent it, not only performs a virtuous service, but will entitle himself to such reward as may be offered therefor?" Directly in point is the dictum in the case of *Broadnax v. Ledbetter*, *supra*, cited in the principal case; "While we have no such distinction suggested, it might well be supposed that a person might become legally entitled to a reward for arresting a criminal, although he knew nothing of its having been offered, where it is or was offered in accordance with law by the government. A legal right might in such a case be given by law without the aid of contract. But the liability of the individual citizen must arise from a contract binding him to pay."

It would seem, therefore, that the rule with respect to knowledge of the offer of a reward ought to be as follows: Where the reward is offered by a private individual for a purpose not involving any question of public policy, the creation of a true contract is ordinarily contemplated, and knowledge of the offer on the part of the offeree is necessary to entitle him to recover; yet where the reward is offered

⁶⁷ Dana (Ky.) 28 (1838), which was an action to recover a reward, offered by a board of trustees with authority, for the apprehending of a felon. Held, that it was necessary for plaintiff to aver and show that he pursued and apprehended the felon in consideration of the reward.

by a private individual and where public policy is involved, knowledge of the offer is not necessary to entitle the claimant to recover. But where the reward is offered by the state or by an authorized official, knowledge of the offer on the part of the offeree should be immaterial as a condition precedent to the right of recovery, for the reason that the liability is created by statute and does not rest upon true contract.

The second interesting and important question presented by the principal case is, as to when the terms of an offer of a reward have been complied with. In this particular case the reward was for the "arrest and conviction" of the persons guilty of a certain murder. There was neither arrest nor conviction, since the guilty persons were killed while resisting arrest. The court held that this was a substantial compliance with the terms; that the precise fulfillment of the terms was rendered impossible by the killing which was justifiable, and the court cites as authority *Mosely v. Stone*.⁷ In that case the reward was for the arrest of a fugitive and the person claiming the reward wounded the fugitive in making the arrest. The fugitive died before being delivered to the jailer, such delivery being required by the offer. While it is true, as the court quotes in the principal case, that, "In construing rewards offered for arrest and conviction, the courts have been inclined to look with disfavor upon a too technical interpretation of the word 'conviction,'" nevertheless it would seem that the court went to the extreme limit of elasticity in applying that doctrine, when in effect it held that the killing of supposed criminals in resisting arrest is equivalent to arrest and conviction of such criminals.

J. Emmett O'Brien, '17

Criminal Law: Right of Pardoned Criminal to Photograph taken while in Prison.—In the recent case of *Hodgman v. Olsen*, 150 Pac. (Wash.) 1122 (1915), the Supreme Court of Washington found itself called upon to render a decision upon a state of facts on which there is a dearth of legislation and relatively little judicial authority.

The plaintiff had been convicted of grand larceny and had been pardoned before the expiration of his term in the state reformatory. Subsequent to his discharge, the defendant, the superintendent of the prison, retained his photograph and identifying information which were sent to the authorities in Vancouver and various cities in Washington, causing the plaintiff great embarrassment and humiliation and business detriment. He, therefore, seeks to enjoin the defendant from continuing so to do and to compel the destruction of the photograph in question.

The court held that in such a case an injunction would not lie, laying down the principle that prison authorities have the unquestioned right to take such pictures and retain them for reasonable future use in the detection and identification of criminals and to the accomplishment of that purpose may send such pictures to the police officers elsewhere, when so requested in good faith.

⁷108 Ky. 492 (1900).

A survey of the somewhat limited field of authority in this connection will reveal a strict adherence, on the part of the Washington court, to the generally recognized principles of public expediency on which similar cases have been deemed to turn.

The right of an individual to restrain by injunction the use of his photograph by third persons has been upheld in various of the states,¹ as well as by some of the federal courts,² and the much mooted question as to the right of privacy has been discussed in this connection.

The action of prison authorities in placing in the rogues gallery the picture of one merely *accused* of a crime, but not convicted, has been generally regarded as restrainable by injunction.³ The mere taking of the prisoner's picture under these circumstances has been permitted in a number of jurisdictions where the question has arisen.⁴

In a situation similar to the one under consideration, viz., where the prisoner has been convicted and sentence passed, the courts display a unanimity of opinion to the effect that the taking, retention, and reasonable distribution of such photographs is a lawful exercise of the state's police power and an injunction will not lie to restrain such action.⁵

A satisfactory statement of the general doctrine and the reasons underlying it is found in the case of *Schulman v. Whitaker*.⁶ There the court asserts, "Convicts and hardened criminals may forfeit all rights to consideration, to such an extent at any rate, that their pictures may be taken if necessary to their identification. The gallery in question should not be broken up. Law and right have the authority to protect themselves."

It is thus apparent that the rule as laid down in the case of *Hodgman v. Olsen* is a restatement of the general American view on the subject and may be regarded as an excellent example of judicial interpretation of authoritative opinion.

The New York view was formerly to be found in the case of *Matter of Molineaux v. Collins*, *supra*, where it is held that the photographs and measurements constitute public records, and the superintendents of state prisons could not be compelled by mandamus to surrender them after reversal.

The present rule is discovered in the New York Penal Law, sec. 516, which provides for the return of all photographs to the accused upon a determination of a criminal suit in his favor.

Russell J. McLaughlin, '16.

¹*Schuyler v. Curtis*, 64 Hun (N. Y.) 594 (1892).

²*Corliss v. E. W. Walker Co.*, 57 Fed. 434 (1893).

³*Itzkovitch v. Whitaker*, 117 La. 708 (1906); *Gow v. Bingham*, 57 Misc. (N. Y.) 66 (1907).

⁴*State ex. rel. Bruns v. Clausmeier*, 154 Ind. 599 (1900); *Mabry v. Kettering*, 92 Ark. 81 (1909).

⁵*People ex rel. Joyce v. York*, 27 Misc. (N. Y.) 658 (1899); *Bruns v. Clausmeier*; *supra*; *Downs v. Swan*, 111 Md. 53 (1909); *Matter of Molineaux v. Collins*, 177 N. Y. 395 (1904).

⁶117 La. 704 (1906).

Dead Bodies: Rights of Relatives Regarding Burial.—In the recent case of *Finley v. Atlantic Transport Co.*, 90 Misc. (N. Y.) 480 (1915) the father of the plaintiff died on board defendant's steamship Minneapolis. The defendant thereafter embalmed the body of the deceased so that it became proof against decomposition for a period greatly exceeding the time needed to bring the body to port. The captain then, without notifying the plaintiff, had the body thrown overboard, thus depriving the plaintiff of the right to give the remains of his deceased father a decent and fitting burial.

The court held that this was a violation of the plaintiff's personal rights of solace and comfort in burying the body of his deceased parent, for which he might recover. The court further said that, if any others of the next of kin were injured, they also were entitled to sue individually for such injury to them.

This decision presents for consideration three very interesting questions. First, What is the nature of the right which the surviving relatives have in the remains of a deceased person? Second, In whom does this right vest? And third, What is the measure of damages in such cases?

I. Discussing first the nature of this right, we find that in England, under the early common law, no property rights in dead bodies were recognized. This was necessarily true, as the whole matter of sepulture and custody of the body after burial was within the exclusive cognizance of the church and the ecclesiastical courts.¹ However, England later recognized the right of possession of a dead body in those nearest in relation for purposes of burial or other lawful disposition of the body.²

In the United States the situation was very much different, as the courts in this country were not held back and hampered by the rules of the ecclesiastical courts. That there can be no property in a dead body, using the word in its ordinary sense, may well be admitted.³ Yet the burial of the dead is a subject which interests the feelings of mankind to a much greater degree than many matters of actual property. There is a duty imposed by universal humanitarian sentiments properly to care for dead bodies, a duty which is in reality a right to protect the body from violation; and while the courts have said that there is no property right, strictly speaking, in dead bodies, they have generally admitted that there is a right to possession of the body. This is a right which the courts have labeled as a *quasi-property* right. This view has been taken by the courts in Rhode Island,⁴ and also by those in several other states.⁵ Thus in the case of *Danahay v. Kellogg*,⁶ the New York court based its argument upon the fact that the right of protecting the remains of the dead and saving them from desecration is a right distinguishable

¹Rex v. Coleridge, 2 B. & Ald. (Eng.) 806 (1819).

²Bl. Com. 429.

³Meagher v. Driscoll, 99 Mass. 281 (1868); In the matter of Widening Beekman Street, 4 Brad. Surr. (N. Y.) 503 (1856).

⁴Pierce v. Proprietors, 10 R. I. 227 (1872).

⁵Larson v. Chase, 47 Minn. 307 (1891).

⁶70 Misc. (N. Y.) 25 (1910).

from the right of ownership, which can be enforced by appropriate legal remedies.⁷

However, irrespective of this question whether a corpse is property or not, the important fact is that the custodian of it has a legal right to its possession for the purposes of preservation and burial, and that any interference with that right, by mutilation or otherwise disturbing the body, is an actionable wrong. And it may be safely laid down as a general rule that an invasion of any right recognized and protected by the common law will, if damages directly flow from such wrong, be the subject of compensation.⁸

II. Turning to the second question raised by this case, viz., In whom does this right vest?, we do not encounter any great diversity of opinion amongst the courts of the different states. As a general rule it may be stated that the right and duty to select a place of burial and see to the proper interment of the deceased rest primarily with the surviving husband or wife or next of kin, rather than with a stranger to the blood.⁹ Where the dispute, as to whom should perform these duties and care for the body, is between the surviving husband or wife and the next of kin, the courts have generally agreed that, in the absence of testamentary disposition, the right of the surviving wife or husband is paramount to that of the next of kin.¹⁰ The wife is the constant companion of her husband during life and is bound to him by the closest ties of affection. Certainly she, if anyone, should have the prior right to render the last sacred services to his remains after death. The Rhode Island court in the case of *Hackett v. Hackett*¹¹ modified this rule to a slight degree by saying that, where the wife of the first marriage died and the husband remarried a son of the first marriage has a prior right to possession of the body of his deceased father.

In cases where there is no surviving husband or wife, the rule apparently is that only the next of kin may sue.¹² That is to say, the right vests in the person or persons who, in case the deceased died intestate, would be entitled to his personal property. The New York courts, however, as a result of the decision in the principal case, and a similar decision in another recent case,¹³ seem to repudiate this doctrine and take the view that a personal right of solace and comfort in burying the remains vests in all the near relatives of the deceased, as well as in those who are technically his next of kin. This court draws the distinction between the right to possession of the remains of the deceased, and the right to solace and comfort in burying the

⁷*Bogert v. Indianapolis*, 13 Ind. 134 (1859), even went so far as to say that that bodies of the dead belong to the surviving relatives, in order of inheritance, as property.

⁸*Koerber v. Patek*, 123 Wis. 453 (1905); *Foley v. Phelps*, 1 App. Div. (N. Y.) 551 (1896); *Louisville & Nashville R. R. Co. v. Wilson*, 123 Ga. 62 (1905).

⁹*Burney v. Children's Hospital*, 169 Mass. 57 (1897); *Darcy v. Presbyterian Hospital*, 202 N. Y. 259 (1911).

¹⁰*Weld v. Walker*, 130 Mass. 422 (1880); *Matter of Richardson*, 29 Misc. (N. Y.) 367 (1899).

¹¹18 R. I. 155 (1893).

¹²*Floyd v. Atlantic Coast Line R. R. Co.*, 167 N. C. 55 (1914).

¹³*Coleman v. St. Michael's P. E. Church*, 90 Misc. (N. Y.) 118 (1915).

body. The former right vests only in the next of kin, while the latter is a right common to all the near relatives. This view is peculiar to New York and does not find support in cases adjudicated elsewhere.

III. The last and undoubtedly the most interesting of the three propositions is, What is the measure of damages in such a case? Admitting that the interference with the plaintiff's right in cases of this sort is an actionable wrong, the question then is asked, What damage has he sustained as the result of the invasion of this right? Clearly he has suffered no actual pecuniary loss and, unless damages are allowed for mental suffering, only nominal damages could be recovered and such relief would obviously be inadequate. On review of the authorities it is clear, that some torts do and others do not subject the perpetrator to liability to compensate for the anguish and suffering which his wrongful act imposes upon the victim. Thus, in cases of mere negligence there is no intent to offer indignity to, or wound the feelings of another; and unless physical injury is caused, out of which in natural sequence arises mental as well as physical pain, damages for mental suffering will not be allowed.

In the case of *Summerfield v. Western Union Tel. Co.*¹⁴ Mr. Justice Winslow quoted approvingly from *Western Union Tel. Co. v. Rogers*,¹⁵ a description of torts, other than negligence, supporting recovery for mental suffering as an independent element, as follows: "Cases of wilful wrong—especially those affecting the liability, character, reputation, personal security, or domestic relations of the injured party."

In addition to those cases included under the above classification, there is still another instance where mental suffering is a proper element of compensation.¹⁶ This class may be most ably defined by quoting from the opinion of the learned Mr. Justice Mitchell, in the case of *Larson v. Chase*, *supra*; "wherever the act complained of constitutes a violation of some legal right of the plaintiff, which always in contemplation of law, causes injury, he is entitled to recover all damages which are the proximate and natural consequences of the wrongful act. That mental suffering and injury to the feelings would be ordinarily the natural and proximate result of knowledge that the remains of a deceased husband had been mutilated is too plain to admit argument."

Thus, to state the proposition generally, it would seem that, if a cause of action exists independently of the mental suffering, so that an action will lie at any rate, there can be no doubt of the right to compensation for any mental suffering which proximately follows.

R. W. Orr, '16.

¹⁴87 Wis. 1 (1894).

¹⁵68 Miss. 748 (1891).

¹⁶Medical College of Georgia v. Rushing, 1 Ga. App. 468 (1907); Palenzke v. Bruning, 98 Ill. App. 644 (1900).

Deeds: Deposit with Third Person to be Delivered on Grantor's Death.—The most recent expression of a New York court upon the question of the effect of a deed, delivered to a third person to be by him delivered to the grantee after the grantor's death, is given in the case of *Saltzsieder v. Saltzsieder*, 167 App. Div. (N. Y.) 801 (1915), in which the grantor, after executing a deed in favor of his three sons, and at the same time executing his last will and testament, delivered both instruments to his attorney, instructing him to hold the deed until his death, and then "hand it over to his sons, the three boys." After the delivery to the attorney the grantor, who was a widower, remarried. After his death the plaintiff, a child of this second marriage, contending that the will and deed must be considered as one instrument, revoked by the birth of the plaintiff and by the making of subsequent wills, and that there was no valid delivery of the deed, obtained a judgment in the lower court declaring void, and directing the cancellation of record of the deed. The appellate court reversed the judgment, holding that the "instructions given in regard to the delivery of the deed made that transaction complete in itself, disconnected from any association with the testamentary disposition of Saltzsieder's property, and operated at once to create a title in the sons which was to become effective upon his death. Neither his control over the property itself, during his lifetime, nor his execution of subsequent wills, nor the birth of a child thereafter, could defeat the title thus created."

It is not intended here to treat generally of the broad subject of delivery to a third person, but to discuss only deeds delivered to a third person *with instructions to deliver after the grantor's death*.

Such a deed has frequently been termed an *escrow*. This is inaccurate. In the words of Chief Justice Shaw, in the leading case of *Foster v. Mansfield*,¹ "Where the future delivery is to depend upon the payment of money, or the performance of some other condition, it will be deemed an *escrow*. Where it is merely to await the lapse of time, or the happening of some contingency, and not the performance of any condition, it will be deemed the grantor's deed presently."²

It is well settled in America that a conveyance deposited with a third person for delivery after the grantor's death, if the grantor in making such deposit reserves no power thereafter to control in any manner the disposition of the same, is effective to pass title as of the date when the deed is deposited.³ But as to the proper theory upon which this conclusion is reached, there is a decided conflict of authority.

There are two clearly defined theories upon which the courts have proceeded. First, title is considered as passing immediately to the

¹ 13 Metc. (Mass.) 412, 415 (1841).

² See also *Hathaway v. Payne*, 34 N. Y. 92 (1865); *Stephens v. Rinehart*, 72 Pa. St. 434 (1872); 26 H. L. R. 565, 578.

³ See note in 37 Amer. & Eng. Ann. Cas. 378, and cases cited therein; also note to case of *Munro v. Bowles*, 54 L. R. A. 865, 869, and cases cited therein.

grantee, full and complete, upon the first delivery.⁴ According to the second theory no title passes until the final delivery, and then and thereafter the title, is by relation, deemed to have vested as of the time of the first delivery.⁵ Often in the same jurisdiction a court has wavered from one to the other of these two theories.⁶

With one exception,⁷ the courts of New York have consistently in respect to the precise facts before us, adhered to the second theory, which theory is usually termed the doctrine of relation.⁸ In the words of Chief Justice Denio, in the leading case of *Hathaway v. Payne*,⁹ "a deed may be delivered to a third person, as this was, with instructions to be finally delivered to the grantee, after the death of the grantor. In such a case, the weight of authority is, that no title passes until the final delivery, and that then, and thereafter, the title is, by relation, deemed to have vested as of the time of the first delivery to the third person." Again in *Little v. Ferris*,¹⁰ it was said, "It has long been settled that a deed may be delivered by a grantor to a stranger with instructions that it be delivered to the grantee after the death of the grantor; and where no right to revoke such instructions is reserved, such second delivery relates back to the first delivery, and title passes as of the date of the first delivery."

There is, however, one case in New York which, in dealing with a similar state of facts, proceeds upon an entirely different theory, namely, the theory that title immediately passes, full and complete, upon the first delivery. In *Brown v. Austin*¹¹ a delivery of deeds to a third person with instructions to deliver to the grantees after the death of the grantor, or before if he should direct, was deemed to be an irrevocable delivery and effective so as to pass title immediately, even as against intervening rights of creditors which had

⁴*Bury v. Young*, 98 Cal. 446 (1893); *Wilhoit v. Salmon*, 146 Cal. 444 (1905); *Stout v. Rayl*, 146 Ind. 379, 385 (1896); *Hinson v. Bailey*, 73 Iowa, 544 (1887); *Loomis v. Loomis*, 178 Mich. 221, 224 (1913); *Terry v. Glover*, 235 Mo. 544 (1911); *Brown v. Westerfield*, 47 Neb. 399 (1896); *Schlicher v. Keeler*, 61 N. J. Eq. 394 (1901); *Arnegard v. Arnegard*, 7 N. D. 475, 495 (1898); *Maxwell v. Harper*, 51 Wash. 351, 356 (1909); *Frutsman v. Baker*, 30 Wis. 644 (1872).

⁵*Owens v. Williams*, 114 Ind. 179 (1887); *Goodpaster v. Leathers*, 123 Ind. 121 (1889); *Foster v. Mansfield*, 3 Metc. (Mass.) 412 (1841); *Haeg v. Haeg*, 53 Minn. 33 (1893); *Wicklund v. Lindquist*, 102 Minn. 321 (1907); *Sneathen v. Sneathen*, 104 Mo. 201, 209 (1891); *Williams v. Latham*, 113 Mo. 165 (1892); *Crooks v. Crooks*, 34 Ohio St. 610 (1878); *Stephens v. Rineheart*, 72 Pa. St. 434 (1872); *Henry v. Phillips*, 105 Texas 459, 464 (1912).

⁶See footnote to 26 H. L. R. 565, 579.

⁷*Brown v. Austen*, 35 Barb. (N. Y.) 341 (1861).

⁸*Ruggles v. Lawson*, 13 Johns (N. Y.) 285 (1816); *Tooley v. Dibble*, 2 Hill (N. Y.) 641 (1842); *Goodell v. Pierce*, 2 Hill (N. Y.) 659 (1842); *Nottbeck v. Wilks*, 4 Abb. Pr. (N. Y.) 315 (1857); *Hathaway v. Payne*, 34 N. Y. 92 (1865); *Carpenter v. Commings*, 4 N. Y. Supp. 947 (1889); *Rosseau v. Bleau*, 131 N. Y. 177 (1892); *Campbell v. Morgan*, 68 Hun. (N. Y.) 490 (1893); *Langworthy v. Crissey*, 10 Misc. (N. Y.) 450 (1894); *Ranken v. Donovan*, 46 App. Div. (N. Y.) 225 (1899); *Yutte v. Yutte*, 39 Misc. (N. Y.) 272 (1902); *Tompkins v. Thompson*, 93 N. Y. Supp. 1070 (1905); *Stonehill v. Hastings*, 202 N. Y. 115 (1911); *Little v. Ferris*, 85 Misc. (N. Y.) 526 (1914).

⁹34 N. Y. 92 (1865).

¹⁰85 Misc. (N. Y.) 526 (1914).

¹¹35 Barb. (N. Y.) 341 (1861).

accrued between the first and second deliveries. This, as previously shown, is clearly out of line, both with those cases which preceded it and those which followed it.

In the principal case the court makes a statement that the deed "operated at once to create a title in the sons which was to become effective upon his death," and that "neither his control over the property itself, during his lifetime, nor his execution of subsequent wills, nor the birth of a child thereafter, could defeat the title thus created." From this statement alone it is not quite clear as to the exact theory upon which the court proceeded, but if read in the light of the fact that it quotes at length from the case of *Stonehill v. Hastings*,¹² which quotation includes the words of Chief Justice Denio in *Hathaway v. Payne*¹³ that "no title passes until the final delivery, and that then, and thereafter, the title is, by relation, deemed to have vested as of the time of the first delivery to the third person," it appears that the court fully recognizes the doctrine of relation. This statement of the court must then be construed as meaning that, as between the grantor and grantee, the title had passed to such an extent as to prevent the grantor by any act of his from defeating the title thus created, but that the deed was not effective to pass full and complete title until the final delivery.

What is the effect in New York of this theory of relation on the rights of third persons intervening between the first and second deliveries? This theory of relation, as applicable to true *escrows*, has generally been held not to operate so as to defeat the intervening claims of creditors of the grantor.¹⁴ It would seem on principle that this rule should likewise be so extended to the case of a deed to be delivered after the death of the grantor; that this doctrine of relation, being but a mere fiction, should not be indulged for the purpose of defeating the rights of third persons which have vested before actual acceptance.¹⁵ Apparently in New York it would not be applied to the prejudice of the intervening rights of third persons, not parties or privies.¹⁶ In *Rosseau v. Bleau*,¹⁷ it was held that an action might not be maintained by the representatives of a deceased person to set aside as fraudulent against creditors a deed not delivered until after the latter's death for the reason that such a deed did not become operative during life, and that, therefore, the grantor died so seized that the liens of creditors attached under the statutes relating to real estate of deceased persons. Also in *Carpenter v. Commings*¹⁸ it is stated, "That (title) remained in the grantor down to

¹²202 N. Y. 115 (1911). ¹³34 N. Y. 92 (1865).

¹⁴*Wolcott v. Jones*, 7 Colo. App. 360 (1896); *Taft v. Taft*, 59 Mich. 185 (1886); *May v. Emerson*, 52 Ore. 262 (1908); *Jackson v. Rowland*, 6 Wend. (N. Y.) 667 (1831); *Brown v. Austin*, 35 Barb. (N. Y.) 341 (1861); see note to the case of *May v. Emerson*, 16 Amer. & Eng. Ann. Cas. 1132, and cases cited therein; see also note to the case of *Wilkins v. Somerville*, 130 Am. St. Rep. 911, 970, and cases cited therein.

¹⁵See note to the case of *Munro v. Bowles*, 54 L. R. A. 865, 904.

¹⁶*Heath v. Ross*, 12 Johns. (N. Y.) 140 (1815); *Carpenter v. Commings*, 4 N. Y. Supp. 947 (1889); *Rosseau v. Bleau*, 131 N. Y. 177 (1892).

¹⁷131 N. Y. 177 (1892). ¹⁸4 N. Y. Supp. 947 (1889).

the time of his death. Upon their delivery after the happening of that event, the title by relation is deemed as have vested as of the time of the first delivery to Commings. * * * Therefore, a judgment or other lien against the grantor would have become a lien upon the lands notwithstanding the deed. A widow is entitled to dower in all the real estate owned by her husband during coverture. If, then, the title remained in Carpenter, the husband, may it not be said to follow that, notwithstanding the deeds, undelivered to the grantees during his life, and although upon delivery after his death the title passed by relation, she became entitled to dower, having survived him."¹⁹

Selby G. Smith, '16.

Employer's Liability: Constitutionality of the Workmen's Compensation Act. On August 15th, 1914, an employee of the Southern Pacific Railroad Company was killed while unloading one of the company's steamships at a pier in the Hudson River. His widow claimed compensation under the Workmen's Compensation Law.¹ The railroad defended on the ground that the law violated the Fourteenth Amendment to the Constitution of the United States. The Court of Appeals in *Matter of Jensen v. Southern Pacific Co.*, 215 N. Y. 514 (1915), held the law within the police power of the state.

This decision seems rather startling in view of the *Ives* case² in which the Court of Appeals so roundly condemned the Wainwright Compensation Act.³ The Wainwright Act was declared a violation of Article I, section 6, of the state constitution, since it made the employer liable without fault. An amendment to the state constitution⁴ prevents a similar holding in regard to the present law, yet the wording of the state and federal constitutions is the same, and the reasoning of the *Ives* case would seem to apply with equal force to the question of constitutionality under the federal constitution. Mr. Justice Miller in the *Jensen* case gave two reasons for disregarding the *Ives* case. "The two acts are fundamentally and essentially dissimilar," and, "Upon the question of whether an act offends against the Constitution of the United States, the decisions of the United States Supreme Court are controlling."

That the *Ives* case is not binding because of the difference between the two acts seems scarcely tenable. The underlying theory of all workmen's compensation legislation is that the economic loss resulting from injuries to employees should be a fixed charge upon the industry, and should be borne by the consumer. The common law theory was that, if the employee bore this loss directly, he would take his liability to injury into consideration in bargaining for wages and would thus be recompensed for his risk; the employer would increase the price of his product in proportion to the increase in

¹⁹But see the case of *Yutte v. Yutte*, 39 Misc. (N. Y.) 272 (1902) where a widow was held not to have any dower right.

¹Chap. 67 of the New York Consolidated Laws; L. 1914, ch. 41.

²*Ives v. South Buffalo Ry. Co.*, 201 N. Y. 271 (1911).

³L. 1910, ch. 674. ⁴Art. I, sec. 19.

wages and the consumer would bear the burden. It is notorious that this theory broke down in practice. The employee never realizes the inevitability of such loss, nor can he calculate his particular chance of escaping it. Each employee considers that he will be the lucky one who will escape injury, and make his bargain accordingly. The theory of the Wainwright Act is that the employer is much shrewder and more farsighted than the employee. The very fact that he attains and keeps his status as employer evidences this. If the loss is cast directly upon the employer, he will insure himself against the risk and add the premiums to the price of the product. The best proof of the correctness of this theory is the number of employers who insured against actions for negligence under the law as it previously existed. The theory of the present law is that the employer should be *compelled* to insure against the risk to the employee and thus distribute the loss over the entire industry, and ultimately upon the consumer. In practice the results of these two acts are the same. Self-interest under the Wainwright Act has the same effect as legal compulsion under the present law. This identity of result is greatly strengthened by the fact that the employers in large concerns,—which under the previously existing law did not insure against negligence suits because they were large enough to bear the risk themselves, and which under the Wainwright theory would not for similar reasons insure against the risks of the employment—are under the present law allowed to be self insurers.⁵ For these reasons the difference between the Wainwright Act and the present law does not seem sufficient to enable the court to disregard the reasoning of the *Ives* case.

But it is said that, when a federal question is involved, the federal decisions are controlling. The statements in the New York cases certainly lay down this proposition,⁶ but it should be noted that the decisions are in cases where a contrary holding would have given a right of review to the federal courts,⁷ except in *York v. Conde*⁷ where there was no established state rule.

⁵Sec. 50, sub-div. 3.

⁶"A federal question being raised, we are bound to follow the decisions of the Supreme Court of the United States, even if they are in direct opposition to those of the Court of Appeals which would otherwise be controlling." *Grant v. Cananea Copper Co.*, 117 App. Div. (N. Y.) 576 (1907).

⁷*Grant v. Cananea Copper Co.*, *supra*, (service on the president of a foreign corporation which owned no property in the state and carried on no business there, and which had appointed no agent upon whom service was to be made, was held to be in violation of the Fourteenth Amendment since the president was unofficially within the state); *Hintermister v. First National Bk.*, 64 N. Y. 212 (1876) (suit was under the National Banking Act); *Duncomb v. N. Y. H. & N. R. R. Co.*, 84 N. Y. 190 (1881) (question arose under the National Banking Act); *Sibley v. Sibley*, 76 App. Div. (N. Y.) 132 (1902) (punishment of refusal to pay alimony and counsel fees *pendente lite* by striking out answer and refusing to allow defense of the suit was held to be a violation of the Fourteenth Amendment); *Johnston v. Mutual Reserve Life Insurance Co.*, 43 Misc. (N. Y.) 251 (1904) (the judgment of a court in another state was held to be good, since the full faith and credit clause was involved); *United Lead Co. v. Lehigh Valley R. R. Co.*, 156 App. Div. (N. Y.) 525 (1913), (the question arose under the Interstate Commerce Act); *In re Chamavas*, 21 N. Y. Supp. 104 (1892) (an alien was refused the benefit of a federal act which allowed aliens who had served in the armies of the United States to be naturalized without taking out their first papers).

⁸147 N. Y. 485 (1896).

Granting that the federal decisions are controlling in this case, the question arises, What does the *Noble State Bank* case,⁹ on the sole authority of which the *Jensen* case was decided, stand for? In that case the Supreme Court of the United States held constitutional an Oklahoma statute compelling contribution by every state bank to a depositors' guaranty fund from which depositors were to be indemnified in case a state bank become insolvent. But an important distinction should be noticed between the Oklahoma statute and the Workmen's Compensation Law. In the former the banks were forced to insure in order to make certain that they fulfilled a duty which they already owed their depositors. In the latter a duty is created and the employers are forced to insure to make certain its fulfillment. The *Noble State Bank* case is ample authority for the compulsory insurance scheme, if such duty can be imposed, but it does not affect the fundamental question,—Can an employer who is guilty of no negligence be made liable for injuries suffered by his employee?

Liability without fault is not unknown in our law. Such liability was recognized at common law. The entire doctrine of *respondent superior* is based upon this principle. The master may use utmost care in selecting a servant and supervising his work, yet he is responsible for the tortious act of the servant, even though it was committed against his express orders.¹⁰ Liability without fault has also been imposed by statute.¹¹ *State ex rel. Davis-Smith Co. v. Clausen*¹² gives numerous examples of such liability.

The objects to be attained by the Workmen's Compensation Law are clearly within the police power.¹³ The highest courts

⁹*Noble State Bank v. Haskell*, 219 U. S. 104 (1911).

¹⁰*Cosgrove v. Ogden*, 49 N. Y. 255 (1872).

¹¹See *Bertholf v. O'Reilly*, 74 N. Y. 509 (1878), for statute holding landlord, who rented with knowledge that liquor was to be sold on the premises, absolutely liable for injuries caused by intoxication; *Chicago, R. I. & P. R. Co. v. Zerneck*, 183 U. S. 582 (1902), for statute making railroad absolutely liable for the death of any passenger unless caused by the passenger's criminal negligence or by his wilful disregard of rules; *St. L. & S. F. Ry. v. Mathews*, 165 U. S. 1 (1897), for statute making railroad liable without regard to negligence for injuries caused by fire.

¹²65 Wash. 156 (1911).

¹³"The right to exercise police power as such over the operator arises in part at least from the fact that he is engaged in an extra-hazardous business, which may, by reason of the liability of his employees to suffer injury therein, resulting in death or permanent disability, cause them to become public charges, thus lowering the standard of citizenship and increasing the general burden of taxation, and from the further fact that our present system of common law and statutory actions greatly increases the expenses of maintaining our courts, causes a vast economic waste, and tends to create breaches and dissensions between employer and employees that would not otherwise exist. The latter consideration is one pertaining to the peace, order and morals of the community which are universally recognized as subject to the police power." *Cunningham v. N. W. Improvement Co.*, 44 Mont. 180 (1911); accord, *Consolidated Coal Co. v. Illinois*, 185 U. S. 203 (1901).

"The power to regulate applies alike to all employments. The test of the power is found in the effect the pursuit of the calling has on the public weal rather than in the inherent nature of the employment itself." *State ex rel. Davis-Smith Co. v. Clausen*, *supra*.

"The State still retains an interest in his welfare, however reckless he may be. * * * When the individual health, safety and welfare are sacrificed or neglected, the state must suffer." *Holden v. Hardy*, 169 U. S. 366 (1898).

in several states have held similar acts constitutional. The Washington act,¹⁴ which is identical in principle with the New York act, was so held.¹⁵ A Montana act providing for the establishment of a fund for the indemnification of injured miners was held unconstitutional because the employee retained his right to an action for negligence, even though the employer had contributed to the fund, the court inferentially holding that, if the sole recourse of the employee had been to the fund, the act would have been constitutional.¹⁶ The California act¹⁷ which was held valid in *Western Indemnity Co. v. Pillsbury*¹⁸ provided for optional participation in the insurance fund, although the liability to recompense the employee was absolute. Mr. Justice Sloss, two justices concurring, in the prevailing opinion went on the theory that the distribution of economic loss resulting from injuries in the course of employment is a public purpose regardless of whether the employment is extra-hazardous, and on the theory that the state could impose liability on the employers for such injuries regardless of the interposition of an insurance fund. The primary question was held to be,—Can the liability be imposed? not, Does the interposition of an insurance fund make such liability reasonable? Three other justices concurred solely on the ground that the elective insurance fund gave a chance for the equitable distribution of such loss over the entire industry. But, even under an act such as the Wainwright Act, the employer can always insure himself in a private company if he wishes. The distinction between a private and a state insurance fund would seem to be immaterial. This case can be profitably consulted for a well-reasoned discussion on both sides of the question.

L. I. Shelley, '17.

Equity: Reformation and Rescission for Mistake.—There has been considerable difficulty in determining just what is a mutual mistake of fact in a written instrument sufficient for a court of equity to grant reformation of the instrument, and a good illustration of that difficulty is the late case of *Salomon v. North British Merchants Insurance Co.* 150 App. Div. (N. Y.), 728; *aff'd*, 156 App. Div. (N. Y.), 944; *reversed*, 215 N. Y. 214 (1915).

The power to reform or rescind a written contract is peculiar to equity courts. The law courts, chiefly because of the parol evidence rule, have generally restricted themselves to determining the rights of the parties in accordance with their written stipulations, wherever there are such written stipulations. But in equity the chancellor has, in three kinds of cases particularly, taken jurisdiction to reform a written instrument, namely, in certain cases of unilateral mistake, where there has been a mistake on one side

¹⁴Rem. & Bal. Ann. Code (supp. 1913), sec. 6604 and following sections.

¹⁵State ex rel. Davis-Smith Co. v. Clausen, *supra*.

¹⁶Cunningham v. N. W. Improvement Co., *supra*.

¹⁷Cal. Stats. 1913, p. 279.

¹⁸151 Pac. 398 (1915).

and fraud or inequitable dealing on the other side; in a few cases of mistake of law; and in cases where, because of a mutual mistake of fact, the instrument does not express the actual agreement of the parties.

In the first two classes of cases, equity has been very loath to grant relief, and has restricted its jurisdiction within very limited lines. The general rule has been laid down that reformation will not be granted in case of a unilateral mistake and even rescission will not be allowed, except where the defendant had been guilty of fraud, or has induced the mistake, or had reason to believe when he entered into the contract that the plaintiff was mistaken, and took advantage of the plaintiff's ignorance by entering into such a contract. It would also seem that where an undeserved benefit, so great in amount as to operate as a hardship, is conferred on the defendant, equity should give relief, unless in the restitution harm would be done between the parties.¹

In one case of unilateral mistake equity will grant reformation, in the absence of fraud or any other inequitable dealing on the part of the defendant, namely, where the donor of property has made a mistake, purely unilateral.²

In all other cases of unilateral mistake the broad rule is laid down that reformation will not be granted in the absence of fraud or inequitable dealing in the part of the defendant.³

Mistake of Law. The broad general rule is that a mistake as to a general law is no ground for the reformation or rescission of an instrument in writing. There are, however, exceptions to this general rule which may be classified under four separate heads.

(1) Where there was a previous agreement, and in the attempt to reduce it to writing, the draftsman so draws up the instrument that it does not fulfill the manifest intention of the parties thereto, or violate this intention, *by mistake either of fact or law*, equity will reform it and make it conform to the previous agreement and intention of the parties, which was expressed or implied when the agreement was made. It is no answer to say that the scrivener used the words which he intended to use, for it is the intention of the parties

¹Moffett & Co. v. Rochester, 178 U. S. 373 (1900).

For an extreme view of rescission, see Werner v. Rawson, 89 Ga. 619 (1892), For a case, however, where the great hardship did not persuade the court to act, see the case of Coffin v. City of Brooklyn, 116 N. Y. 159 (1889), where the city having no interest in the property, sold it on tax sale. Relief was refused because in tax sales an exception is made to the effect that, unless a warranty deed is secured the plaintiff takes at his own risk.

²Andrews v. Andrews, 12 Ind. 348 (1859).

³Curtis v. Albree, 167 N. Y. 360 (1901); Botsford v. McLean, 45 Barb. (N. Y.) 478 (1866); Smith v. Mackin, 4 Lans. (N. Y.) 41 (1871); Welles v. Yates, 44 N. Y. 525 (1871); Christopher St. Ry. Co. v. 23d St. Ry. Co., 149 N. Y. 51 (1896); Fullerton v. Dalton, 58 Barb. (N. Y.), 236 (1870); Wilson v. Deen, 74 N. Y. 531 (1878); Greditzer v. Continental Ins. Co., 91 Mo. App. 534 (1902); Cushman v. Northeastern Fire Ins. Co. 65 Vt. 569 (1893); Morgan v. Owens, 228 Ill. 598 (1907); Chelsea Nat'l Bank v. Smith, 69 Al. (N. J.) 533 (1908); but see Moehlenpach v. Mayhew, 138 Wis. 561 (1909).

to the instrument that is looked into. This exception is almost universally recognized.⁴

(2) Where, through a mistake of law, an invalid security is accepted in the place of a valid one, relief is generally given, although this relief is usually given by a rescission of the invalid security, the valid one thereby standing in force.⁵

(3) Whenever a person is mistaken as to his *private* rights, liabilities, interests, or duties, equity will give relief, treating the mistake as equivalent to a mistake of fact. For example, where a person is mistaken as to his rights or interest in certain property and make a contract or agreement because of such mistake, equity will at least rescind such an instrument.⁶

(4) It would appear that wherever one party has received a substantial, unjust enrichment, at the expense of the other party, or has induced the action on his part, or has in some way taken an unconscionable advantage of him, equity will *at its discretion* take jurisdiction and give relief.⁷

Mutual Mistake of Fact. Almost all cases of reformation and rescission for mistake come under this heading of mutual mistake of fact, and here equity acts with a much freer hand and upon more settled ground. The general rule could probably be stated as follows: where, by a mutual mistake of the parties, an instrument fails to carry out their understanding, equity has jurisdiction to conform the instrument to the agreement actually entered into.

The chief element in this rule is that the mistake *must be mutual*, for otherwise it would come within the rules as to unilateral mistake. The equity is effective against all persons but innocent holders for value.⁸

⁴Hunt v. Rousmaniere, 1 Peters (U. S.) 1 (1828); Canedy v. Marcy, 13 Gray (Mass.) 373 (1859); Snell v. Ins. Co., 98 U. S. 85 (1878); Chicago & R. R. Co. v. Green, 114 Fed. 676 (1902); Moore v. Tate, 114 Aa. 582 (1896); Hausman v. Burnham, 59 Conn. 117 (1890); Parish v. Canplin, 139 Ind. 1, (1894); Dinwiddie v. Self, 145 Ill. 290, (1893); Jamison v. State Ins. Co., 85 Ia. 229 (1892); Stockbridge Iron Co. v. Hudson Iron Co., 107 Mass. 290 (1871); Corrigan v. Tiernay, 100 Mo. 276 (1889); Kennard v. George, 44 N. H. 440 (1863); McMillan v. Fish, 29 N. J. Eq. 610 (1878); Maher v. Hibernia Ins. Co., 67 N. Y. 283 (1876); Evants v. Adm'rs of Strode, 11 Ohio, 480 (1842); McKenzie v. McKenzie, 52 Vt. 271 (1880); Lardner v. Williams, 98 Wis. 514 (1898); Green v. Morris & R. R. Co., 12 N. J. Eq. 165 (1858).

⁵Re Saxon Life Assur. Co., 2 J. & H. Eng. 408 (1862); Sparks v. Pittman, 51 Miss. 511 (1875); *semble*, McNaughton v. Partridge, 11 Ohio 223 (1842).

⁶For a more lengthy statement and discussion of this rule see, 2 Pom. Eq. Jur. sec. 849.

⁷Turner v. Turner, 2 Rep. in Ch. 154 (1860) (release given under the mistaken belief by the plaintiff that he had no interest in certain property); Cooper v. Phibbs, L. R. 2 H. L. 149 (1867) (to have lease set aside.); Goff v. Gott, 5 Sneed. (Tenn.), 562 (1858) (mistake as to the ownership of a horse); Jeakins v. Frazier, 64 Kan. 267 (1902); Cann v. Cann, 1 P. Wms. 722, 727 (1721); *semble* Gerdine v. Menage, 41 Minn. 417 (1889).

⁸Haviland v. Willets, 141 N. Y. 35 (1894); apparently *semble*, Gerdine v. Menage, 41 Minn. 417 (1889); and for a strong case see, Griswold v. Hazard, 141 U. S. 260 (1891), where relief was given in a case of mistake of law because otherwise a flagrant injustice would be done the plaintiff.

⁹Blackburn v. Randolph, 33 Ark. 119 (1878); Cole v. Fickett, 95 Me. 265, (1901).

The relief will only be granted where the mistake is as to a vital term in the contract, or where the contract as actually written differs in some material respect from that entered into.⁹

In the principal case, the majority of the Appellate Division held that a mutual mistake of fact was involved and affirmed a decree for reformation of the instrument. This holding was reversed in the Court of Appeals, Seabury, J., dissenting.

The facts of the case may be briefly stated. The plaintiff held an assignment of a bond and mortgage from Malbin and Kammerman, and received the insurance policy on the premises, which was made payable to Malbin and Kammerman as mortgagees, as their interest might appear. The plaintiff gave the policy to his agents, telling them to have a memorandum made on it to the effect that the loss, if any, was to be payable to him as mortgagee, otherwise as provided in the policy. The agents sent the policy to the defendant's agent, but requested that the indorsement be made to the effect that the plaintiff had become the owner of the premises, and that the loss should be made payable to him as owner, otherwise to the mortgagees. The defendant's agent so indorsed the policy and it was returned to plaintiff who, after the premises were destroyed by fire, found the mistake and asked to have the policy reformed.

The Court of Appeals through Collin, J., held that the plaintiff was bound to prove that it was the intention of the defendant as well as of himself, to have the policy read and stipulate as he seeks to have it. To warrant reformation the minds of the parties must have met in the contract and in the mistake through which it failed of expression. *The mistake, or each mistake, must have been shared in by each party.* (This, of course, is only true in the absence of fraud or inequitable dealing on the part of the defendant.) Here the defendant did exactly what is intended to do, namely, insure the plaintiff as owner. Therefore, the contract as written was in conformity with the intention of the defendant and there was no mutual mistake.

Seabury, J., dissented from the view of the majority of the court, on practically the same grounds that the Appellate Division had affirmed the judgment for reformation. He held that it was the object of the contract to insure the mortgagee, and that, when the clause was written on the policy, both parties did suppose and intend that it insured the mortgagee and that in this there was a mutual mistake.¹⁰ These contentions seem untenable and appar-

⁹Dortic v. Dugas, 55 Ga. 484 (1875); McCobb v. Richardson, 24 Me. 82 (1844); Brown v. Fagan, 71 Mo. 563 (1880); Sankey's Executors v. Bank, 78 Pa. St. 48 (1875); Pearce v. Suggs, 85 Tenn. 724 (1887); Belknap v. Seally, 14 N. Y. 143 (1856); Paine v. Upton, 87 N. Y. 327 (1882); Melick v. Dayton, 34 N. J. Eq. 245 (1881).

It would also seem, by Laver v. Dennett, 109 U. S. 90 (1883), that one having the right to the reformation of a written contract cannot insist on its rescission in the absence of a default by the defendant.

¹⁰The United States Supreme Court cases relied upon by Seabury, J., were not in point, as in those cases the mistake was made in the drafting of the instrument, the agreement of the parties being clearly contrary to the writing. Neither did the two New York cases cited sustain his contention.

ently the judge was influenced to dissent because of the hardship that would otherwise result to the plaintiff.

This case clearly shows the difficulty in any statement of the rule. It may be stated with logical, abstract exactness, but when it is attempted to apply it to a concrete case, trouble is found in determining whether or not the case involves a mutual mistake of fact. It would furthermore seem that a logical application of the rule is very apt to result in hardship in some cases, as it has resulted in hardship to the plaintiff in this case.

Here the fault clearly lay in the agents of the plaintiff and it is true that the agents' acts are in law the acts of the principal. Nevertheless the plaintiff did not actually cause the policy to be indorsed as it was indorsed. The defendant fully intended to bind itself to pay the loss to some one in case of loss and had clearly contracted to and intended to pay a mortgage, so that the risk was contemplated and intended. In the light of these circumstances, there would be no hardship upon the defendant in requiring it to pay the loss to the real mortgagee; while, on the other hand, there was great hardship to the plaintiff in not being indemnified.

But, notwithstanding the desirability of giving relief to the plaintiff, there seems to be one insurmountable obstacle in a case such as this, namely, that if reformation were given, the court would be making a new contract for the parties, and that the court may not do, in the absence of fraud or inequitable dealing on the part of the defendant, which is lacking here.

Consequently it would seem that the case was properly decided on legal principle,¹¹ and it apparently must be considered as one of those unfortunate cases, where, because of the inadequacy of relief, or the impracticability of laying down a precedent that might ultimately work more harm than good, the courts are powerless to give relief.

H. S. Bareford, '16.

Insurance: Life Insurance: Statutory Abolition of the Common Law Defences of Fraud and Misrepresentation.—The case of *Archer v. Equitable Life Assurance Society of the United States*, 169 App. Div. (N. Y.) 43 (1915), presented definitely to the Appellate Division the important question of what construction is to be put upon sec. 58 of the New York Insurance Law, a statute which has analogues in several other states. The New York statute is as follows, "Section 58. *Policy to contain entire contract; statements of insured to be representations and not warranties.*—Every policy of insurance issued or delivered within the state on or after the first day of January 1907 by any life insurance corporation doing business within the state shall contain the entire contract between the parties and nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are

¹¹The following cases are clearly authority for the construction given the rule by this court: *Paine v. Jones*, 75 N. Y. 593 (1878); *Christopher Ry. Co. v. 23d St. Ry. Co.*, 149 N. Y. 51 (1896); *Curtis v. Albree*, 167 N. Y. 360 (1901).

indorsed upon or attached to the policy when issued; and all statements purporting to be made by the insured shall in the absence of fraud be deemed representations and not warranties. Any waiver of the provisions of this section shall be void."

The action was to recover upon a policy of life insurance issued by the defendant company. The answer, admitting the material allegations of the complaint, set up three separate and several defenses of fraud and misrepresentation of material facts on the part of the insured, fraudulent concealment of facts material to the risk, and a collateral agreement with which this note is not concerned. The statements and representations alleged to have been false and fraudulent were not indorsed upon or attached to the policy when issued. The policy did not attempt to incorporate anything therein by reference. The question was squarely presented, therefore, whether sec. 58 of the insurance law precluded the defendant from setting up as a defence to the action the fraud and the misrepresentation of material facts in inducing the issuance of the policy. The Appellate Division, following the construction theretofore given the statute in the Supreme Court,¹ held, with two judges dissenting, that the defences could not be set up.

The prevailing opinion in the *Murphy* case at page 476 construed the second clause of the statute to mean "that if the insurer intends to claim that it was *induced* to enter into a policy by virtue of any statement of the insured it must express that statement in the policy or attach it thereto, and such statement so attached shall be deemed a representation and not a warranty, but any statement so attached whether a representation or not, shall, upon proof of fraud, avoid the policy." The learned justice regarded this interpretation as in accord with the case of *Becker v. Colonial Life Insurance Company*.² Without commenting on the decision in the *Becker* case, suffice it to say that the court was there concerned with a different state of facts, and basing its decision on those facts, expressly excepted from consideration the very question raised in the *Murphy* and *Archer* cases in these words,^{2a} "We are not called upon to decide at this time what the effect would have been under the New York statute if neither decedent's personal application nor any other paper in the nature of an application had been attached to the policy." Such being the facts, the *Murphy* case must be regarded as standing alone and as laying down the doctrine that false statements of material facts and fraud in an application not attached to the policy nor indorsed thereon cannot be set up as a defence to an action thereon. This rule has been followed by the Appellate Division in the first and fourth departments.³

¹*Murphy v. Colonial Life Insurance Company*, 83 Misc. (N. Y.) 475 (1914). One justice dissented with opinion. Affirmed as to construction of statute, 163 App. Div. (N. Y.) 875 (1914).

²*Becker v. Colonial Life Insurance Company*, 153 App. Div. (N. Y.) 382 (1912).

^{2a}Page 396.

³First Department, *Archer* and *Murphy* cases *supra*. Fourth department, *Mees v. Pittsburgh Life & Trust Company*, 169 App. Div. (N. Y.) 86 (1915).

On the other hand we have an earlier appellate term decision to the effect that false representations made to induce the issuance of a policy, and whether oral or in a paper not attached to the policy, may, if material, be relied upon by the insurer to defeat a recovery.⁴ The question has not squarely arisen in the second and third departments.⁵ In the latter, however, recovery has been denied where there was material false representation.⁶ It is to be regretted, though it is not surprising, that this lack of harmony should exist in the lower courts.

The New York statute was not enacted without a purpose; its aim was to prevent certain evil practices of some insurance companies which grew up under the protection of the common law. The statute is thus remedial in its nature, and, being in derogation of the common law, must be strictly construed. To give it a construction beyond that necessary to cure the evils it was intended to remedy is judicial legislation.

Prior to the statute the difference in doctrine between warranties and representations was founded upon the principle that a warranty was always a part of the completed contract, while a representation was an inducement to, and not a part of, the contract. A representation did not affect the contract unless it was both substantially untrue and also material to the risk. A warranty, however, was a condition and a term in the contract, as to which a strict and literal compliance was necessary. Hence it was held that a false, though innocent, misrepresentation of material fact avoided the policy;⁷ but a breach of warranty avoided the policy whether the matter warranted was material or not, the materiality having been determined by the parties themselves in making it a term of the contract.⁸

Naturally some insurance companies attempted to convert representations into warranties by making them terms in the contract. The doctrine of warranty in the law of insurance was one of great rigor, and was thus made to operate harshly upon the insured. For this reason it became an established rule that answers to questions and statements made in the application were to be construed as representations, and never as warranties, unless the language of the policy was so clear as to preclude any other construction.⁹ Even this extreme rule was pregnant with the evils it attempted to remedy. It made more possible the rule, which likewise became general, that where in the policy the application was expressly

⁴Aaronson v. New York Life Insurance Company, 81 Misc., (N. Y.) 228 (1913).

⁵Second department, Becker case, *supra*. Third department, Rakov v. Bankers Life Insurance Company, 164 App. Div. (N. Y.) 645 (1914).

⁶Rakov v. Bankers Life Insurance Company, *supra*.

⁷Baker v. Home Life Insurance Company, 64 N. Y. 648 (1876); Barteau v. Phoenix Mutual Life Insurance Company, 67 N. Y. 595 (1876); Schas v. Equitable Life Insurance Company, 166 N. C. 55 (1914).

⁸Foot v. Aetna Life Insurance Company, 61 N. Y. 571 (1875); Dwight v. Germania Life Insurance Company, 103 N. Y. 341 (1886).

⁹Spence v. Central Accident Insurance Company, 236 Ill. 444 (1908); Price v. Phoenix Mutual Life Insurance Company, 17 Minn. 497 (1871); Daniels v. Hudson River Fire Insurance Company, 12 Cushing, (Mass.) 416 (1853).

declared to be a part thereof, and the statements therein were warranted to be true, such statements were deemed material, whether they were or not and if shown to have been false the policy was void.¹⁰ The facts in the case of *Kettenbach v. Omaha Life Association*^{10a} well illustrate the evils that might possibly occur under the common law through multiplication of immaterial statements made by the insured and the attempt to give them, by the wording of the policy, the technical character of warranties, and thus place the insured in a position in which it would be difficult if not impossible for him, although he acted in good faith, to recover upon his contract, because of some inaccurate statement on his part. In this case the company asked the applicant if he had ever had any one or more of *fifty-seven* different diseases, and a clause in the policy recited that it was issued in consideration of the application (which was attached to and made a part of the policy) and provided that every person accepting or acquiring an interest in the policy accepted the statement in the application as his own and warranted them to be full, complete and true. If the insurance companies could thus bring their policies within the pale of the common law rules, they had everything to gain and nothing to lose; and if the insured was held to have warranted the truth of a statement, its exact and literal truth was a necessary condition of his right to recover, however immaterial the statement may have been and however honest may have been his conduct.¹¹ As to protecting the interests of the insured, it was here that the common law failed. The necessity of a statute was apparent.

The purpose of the statute was manifestly to change this common law rule and to enact in the place of it one that will hold the contract valid unless the misstatement, if made in the negotiation of the contract, is of a matter which actually increases the risk of loss (innocent misrepresentation of material fact), or is made with actual intent to deceive (fraud). As to mere innocent false representations, the statute is only declaratory, but as to warranties it makes a new rule.¹²

Remedial statutes of like purport exist in many states. A Pennsylvania act of 1885 provided, "When the application for a policy of insurance contains a clause of warranty of the truth of answers contained therein, no misrepresentation or untrue statement in such application, made in good faith by the applicant, shall effect a forfeiture, or be ground of defense in any action brought upon the policy issued upon the faith thereof, unless such misrepresentation or untrue statement relates to some matter material to the risk." In construing this act the court said, "This statute has effected a change in life insurance contracts,—a much needed change so far as some

¹⁰*Phoenix Life Insurance Company v. Raddin*, 120 U. S. 183 (1887); *The Continental Life Insurance Company v. Rogers*, 119 Ill. 474 (1889).

^{10a}49 Neb. 842 (1896).

¹¹*White v. Provident Sav. Assur. Soc. of N. Y.*, 163 Mass. 108 (1895).

¹²*White v. Provident Society*, *supra*; *Kasprzyk v. Metropolitan Life Insurance Company*, 79 Misc. (N. Y.) 263 (1913); *Rakov v. Bankers*, *supra*; *Hartford v. Stallings*, 110 Tenn. 1 (1902).

companies are concerned. The evident purpose of this legislation was to strike down literal warranties so far as they may be resorted to for the disreputable purpose of taking advantage of actually immaterial matters. It provides a rule of construction for the purpose of preventing injustice, and it is as much the duty of the courts to enforce such rules as it is to administer the statute of frauds and perjuries."¹³

The common law defences of fraud, where the company alleges falsity, *scienter*, intent to deceive, and reliance upon such representation, and of innocent misrepresentation of material fact, where the company has the burden of establishing the falsity and the materiality of the representation, were not evils under the common law. The statute was not aimed at their overthrow and should not be construed as doing so.¹⁴ Judge Taft, construing the Pennsylvania act, *supra*, has so held.¹⁵

Those New York courts which hold that the common law defences of fraud and innocent material misrepresentation are no longer available, unless the false statement is contained in a paper so attached to the policy as to become a part of it, are proceeding upon the theory that the statute prevents the introduction in evidence of statements made anterior to and in negotiation of the policy, unless attached to or indorsed upon the policy, regardless of what those statements are and whether fraudulent or not. The legislature could very well have prescribed specifically such a rule of evidence, as has been done in some states.¹⁶ As to the wisdom of such a rule there is some doubt. It is quite possible that cases may arise where the court, under such a rule, would be obliged to sit by with its hands tied and see a palpable fraud committed upon an insurance company.¹⁷ But the silence of the New York statute in this regard is cogent evidence that the legislature did not intend to prescribe such a rule.¹⁸ For the courts, therefore, to read the rule into the statute, seems to be a plain case of judicial legislation. The courts can find no justification for such a construction. Fraud vitiates everything into which it enters, and it is not ordinarily the policy of the law to put difficulties in the way of proving it, especially in the face of a statute which is silent upon the question.¹⁹

The learned judge in the *Archer* case at page 46 construed the statute thus: "The legislative intent, as expressed in the section, is to require insurance companies, when issuing policies, to set out therein the entire contract of insurance, and every statement or representation which induced the company to enter into the agree-

¹³*Herman v. Fidelity Mutual Life Association*, 151 Pa. St. 17 (1892).

¹⁴*Kasprzyk v. Metropolitan*, *supra*; *Rakov v. Bankers*, *supra*.

¹⁵*Penn. Mut. Life Co. v. Mechanics Savings Bank & Trust Co.*, 72 Fed. 413 (1896), reaffirmed 73 Fed. 653 (1896); *Keiper v. Equitable Life Assur. Soc. of U. S.*, 159 Fed. 206 (1908), accord.

¹⁶*Considine v. Metropolitan Life Ins. Co.*, 165 Mass. 462 (1896); *Provident Sav. Life Assur. Soc. of N. Y. v. Beyer*, 67 S. W. (Ky.) 827 (1902), not reported officially.

¹⁷*Albro v. Manhattan Life Ins. Co.*, 119 Fed. 629 (1902), affirmed 127 Fed. 281 (1904).

¹⁸Dissenting opinion of Justice Bijur, *Murphy case*, *supra*.

¹⁹*Empire Life Ins. Co. v. Gee*, 171 Ala. 435 (1911).

ment, and upon which it relied in so doing, if thereafter to be available as a defense to the policy, is to be annexed to and made a part of it." It is submitted that the statutes make no such requirement. The statute does require "that every policy shall contain the entire contract." This means that the policy when issued is the entire contract. It does not require that the negotiations anterior to, and which induce the issuance of the policy, must be attached to the policy. The parties may or may not attach such matter as they choose. It is only when such matter is *written in, attached to, or indorsed upon the policy* that it becomes a part of the contract of insurance between the parties. "And nothing shall be incorporated therein by reference to any constitution, by-laws, rules, application or other writings unless the same are indorsed upon or attached to the policy when issued." This can mean nothing more than that the policy when issued shall constitute the contract of insurance between the parties and that nothing which is not indorsed upon or attached to the policy when issued shall be received in evidence *as a part of the contract*.²⁰ This clause, therefore, should not prevent the unattached application or any other unattached paper or oral statements from being received in evidence for the purpose of contesting the validity of a contract issued upon the faith thereof.

Courts in other states construing statutes of like purport support the construction here submitted.²¹ An apparent conflict of authority in other jurisdictions must be explained by reference to the statutes themselves. There is an obvious distinction between statutes which require the application to be attached to the policy because it is a part of the contract,²² statutes requiring the application, constitution, etc., to be attached when referred to and prohibiting their receipt in evidence for any purpose unless so attached,²³ and statutes requiring them to be attached when referred to and prohibiting their receipt in evidence as a part of the contract unless so attached.²⁴ By the better construction statutes of the second class do not apply where the policy makes no reference,²⁵ nor do they apply to papers not constituting a part of the application, constitution, by-laws, etc., and which are not referred to in the policy.²⁶

²⁰Cohen v. Metropolitan Life Ins. Co., 85 Misc. (N. Y.) 406 (1914); Manhattan Life Ins. Co. v. Verneuille, 156 Ala. 592 (1908).

²¹Johnson v. American National Life Ins. Co., 134 Ga. 800 (1910); Manhattan Life Ins. Co. v. Verneuille, *supra*; Mutual Life Ins. Company v. Allen, 166 Ala. 159 (1909); Empire Life Ins. Co. v. Gee, *supra*.

²²Missouri R. S. 1909, Art. IV, ch. 61, sec. 6978, construed in Schuler v. Metropolitan Life Ins. Co., 176 S. W. (Mo. App.) 274 (1915).

²³Kentucky statutes, sec. 656, 679, construed in Provident Sav. Life Assur. Soc. of N. Y. v. Beyer, 67 S. W. (Ky.) 827 (1902); Mass. Statutes, 1894, ch. 522, sec. 73, Considine v. Metropolitan Life Ins. Co., *supra*; Nugent v. Greenfield Life Assoc., 172 Mass. 278 (1899); Pa. Act. of 1881, P. L. 20, The New Era Life Assoc. v. Musser, 120 Pa. St. 384 (1888); Iowa, Kirkpatrick v. London Guarantee and Accident Co., Ltd., 139 Iowa 370 (1908).

²⁴Johnson v. American National Life Ins. Co., 134 Ga. 800 (1910).

²⁵Holden v. Prudential Ins. Co. of Am., 191 Mass. 153 (1906); Continental Casualty Co. v. Owen, 131 Pac. (Okla.) 1084 (1913).

²⁶Hews v. Equitable Life Assur. Soc. of U. S., 143 Fed. 850 (1906); Boonville v. John Hancock Life Ins. Co., 200 Mass. 197 (1908).

Consistent reasoning demands that they should not apply to oral statements outside of the application, etc., and not referred to. As to statutes of the third class it is well settled that statutes which merely prohibit the use of an application for the purpose of qualifying the policy unless attached to it do not interfere with the use of the application to show fraud in obtaining the policy.²⁷ The Georgia court said, "To consider the application as a part of the contract of insurance, and so forming a warranty or covenant, treats the policy as a valid contract and sets up one of its terms. But to seek to set it aside or repudiate the policy as having been obtained by fraud is to set up that there was no valid and binding contract of insurance. The two things are entirely different." The New York statute, like the Alabama Code, contains no express inhibition upon the receipt of evidence in any form or for any purpose. It requires the policy to contain the entire contract and prohibits incorporation by reference. The most rigid construction that can be put upon it is to prohibit the receipt in evidence of anything as a part of the contract unless it is written in, indorsed upon, or attached to the policy when issued. Such construction accords with sound reason and the weight of authority where the statute contains no general inhibition, and permits the defences of fraud and material misrepresentation without doing violence either to the letter or the spirit of the statute.

The last clause of the New York statute reads, "All statements purporting to be made by the insured shall, in the absence of fraud, be deemed representations and not warranties." This clause must be taken to mean "all statements *in the contract*. . . . shall in the absence of fraud be deemed representations and not warranties"; for sec. 58 was manifestly enacted to provide against the avoidance of the policy because of innocent immaterial statements therein. So much for statements in the contract. Under the preceding clause of the statute, which prohibited incorporation by reference, any statement outside of the policy is not a term of the contract. Hence there can be no warranty outside of the policy. So it has been held that a defence of breach of warranties in an application not attached to the policy, *in the absence of fraud*, no longer exists.²⁸ The section taken as a whole, therefore, obliterates the distinction between representations and warranties, so far as statements of the insured are concerned, by abolishing warranties as to such statements. It is submitted that this is the proper construction of the statute, when applied to statements made in the absence of fraud. The phrase, "in the absence of fraud," would seem to exclude the application of the statute and to leave the parties as they were at common law both as to fraud and innocent material misrepresentation.²⁹

²⁷Carrigan v. Mass. Benefit Ass'n, 26 Fed. 230 (1884); Johnson v. Am. Nat. Life Ins. Co., 134 Ga. 800 (1910); Hews v. Equitable, *supra*.

²⁸Cohen v. Metropolitan Life Ins. Co., 85 Misc. (N. Y.) 406 (1914).

²⁹Kasprzyk v. Metropolitan Life Ins. Co., 79 Misc. (N. Y.) 263 (1913); Aaronson v. N. Y. Life Ins. Co., 81 Misc. (N. Y.) 228 (1913); Rakov v. Bankers Life Ins. Co., 164 App. Div. (N. Y.) 645 (1914).

Statutes containing the same clause but with a further provision, "that no such statement shall avoid the policy unless it is contained in a written application, and a copy of such application shall be indorsed upon or attached to the policy when issued," are found in some states. As to the construction of this provision the authorities are in conflict. Michigan and Tennessee take the extreme view and are in accord with the result of the *Archer* case.³⁰ The Minnesota Supreme Court applied the same doctrine to the case before it, but with the reservation that there might be cases of fraud to which the statute would not apply.³¹ The Illinois appellate court is directly contra.³² The New York statute, however, does not contain this provision.

The decision in the *Archer* case cannot be supported upon principle and seems to be decidedly out of harmony with the better authority. So far as the facts of this case are concerned, the statute has no application at all. The policy contained the entire contract. The statements relied upon in defence were admittedly representations, but they were alleged to have been false and fraudulent. The defendant was standing squarely upon its rights at common law, and these rights the statute, when properly construed, has not interfered with. The statute was enacted to relieve the insured from the hardships consequent upon incorporating immaterial matters into policies by reference, thereby making them warranties. It had no other or further purpose. It accomplished this result by prohibiting incorporation by reference and abolishing warranties as to statements made by the insured. In doing so the legislature had no concern with the abolition of the common law defences of fraud and innocent misrepresentation of material fact. On the other hand, the legislature seems to have expressly reserved them by the phrase "in the absence of fraud." To hold, therefore, that fraud or innocent material misrepresentation, whether oral or in papers not indorsed upon or attached to the policy, cannot be pleaded to defeat a recovery on a policy issued upon the faith thereof, is not only to read into the statute something which is not there, but to read out of the statute something which is there.

Leon A. Plumb, '16.

Marriage: Effect of Decree of Annulment.—the recent case of *McCullen v. McCullen*, 162 App. Div. (N. Y.) 599 (1914), raises a very interesting question with regard to marriage annulled for fraud. In this case the plaintiff brought an action to annul his marriage with the defendant on the ground that she had a husband living at the time of their marriage celebration. The defendant, after the marriage with the plaintiff, obtained a decree annulling her first marriage on the ground of fraud. The question was, whether the decree of annulment of a voidable marriage was retroactive to the

³⁰New York Life Ins. Co. v. Hamburger, 174 Mich. 254 (1913); Arnold v. New York Life Ins. Co., 177 S. W. (Tenn.) 78 (1915).

³¹Wheelock v. Home Life Ins. Co., 115 Minn. 177 (1911).

³²Kennedy v. Prudential Ins. Company of America, 177 Ill. App. 50 (1913).

time of the celebration of such marriage, or whether it merely made the marriage void from the time the decree was rendered. The court by Laughlin, J., upheld the decree of annulment of the second marriage, because defendant had a husband living at the time of said marriage, and placed its decision on the broad ground that a decree of annulment of a voidable marriage is not retroactive.

Section 7, subd. 4, of the Domestic Relations Law provides that: "A marriage is void from the time its nullity is declared by a court of competent jurisdiction, if either of the parties consent to such marriage by reason of fraud." Laughlin, J., in *McCullen v. McCullen* interprets this language as meaning that the annulment decree is not retroactive. But this is contra to the decision of the Court of Appeals in *Jones v. Brinsmade*.¹ That was an action to annul a marriage on the ground of insanity of the husband at the time of marriage. The court there refused the wife alimony and counsel fees for the suit on the ground that the status of the parties established by a decree of annulment necessarily relates back to the time of the contract of marriage. He who elects to rescind a contract can claim nothing under it.

The text writers also plainly say that a decree of annulment is a judicial declaration that no marriage exists and that the marriage is void *ab initio*.² It is claimed by Bishop and others that the words, "void from the time it is declared by the court of competent jurisdiction," means that the marriage is valid till then, but, when it is so decreed, it must necessarily make the whole contract void. It is a rescission of contract for want of consent and it must be rescinded in entirety. Such an interpretation is supported by the terms of section 1749 of the Code of Civil Procedure, providing for the legitimacy of the issue of marriages avoided for want of age or for insanity. It is true that no provision is made in the code³ for the legitimacy of children of marriages annulled for fraud. But this is not taken as evidence that the annulment of such marriage is not retroactive, but as evidence that the legislature intentionally or through oversight has left such children illegitimate.⁴

However, it is submitted that the court in the principal case rendered the right decision on the facts, although it perhaps erred in its conclusion upon law. In the *McCullen* case the plaintiff, who depends upon the existence of a prior marriage at the time that he married the defendant, was not a party to the proceeding to annul the first marriage. Because of the fact that the defendant's former marriage was in force at the time of her subsequent marriage to the plaintiff, the plaintiff at that time acquired a right to have his marriage annulled on the ground that defendant had a husband living at the time of marriage. Now it is well settled that a marriage agreement is a contract and an ordinary contract can not be rescinded so as to defeat the accrued rights of an innocent third party.

¹*Jones v. Brinsmade*, 183 N. Y. 258 (1905).

²1 Bishop, Marriage, Divorce and Separation, secs. 636, 640.

³Code of Civil Procedure, sec. 1751.

⁴Battershall, Domestic Relations, page 71; 26 Cyc. 920.

If one fraudulently obtains property and transfers to a *bona fide* purchaser for value, the defrauded seller can not rescind so as to defeat the title of the innocent purchaser for value. By analogy, it would seem that the right to the annulment of his marriage, acquired by the plaintiff in the principal case while defendant's former marriage was still in existence, should not be affected by the subsequent annulment of that former marriage.

Or, to put it in terms of contract, the plaintiff in the principal case was an innocent party, whose rights under the former marriage had accrued before the annulment of that marriage, and, therefore, *as to him*, the decree annulling the first marriage ought not to be retroactive so as to destroy his right to an annulment of his marriage. There is also indirect authority for such a distinction as has been suggested.⁵ It is said by Bishop: "But if the marriage was voidable, so that until avoided it was good, all transactions in good faith whereby property was transmitted to third persons will be good as to such persons." and again, he says, "If while such a marriage is in existence, the wife receives a chattel in gift to her, and the husband sells it, the purchaser will acquire a title which can not be divested by a decree of nullity." It is believed, therefore, that, though the decision in the *McCullen* case is correct, it should have been based on the conclusion of law, that a decree of annulment, as to the parties to the suit, is retroactive, but that is not retroactive so as to divest third parties of their rights.

John H. Machan, '17.

Real Property: Titles to beds of Lakes in New York.—A peculiar situation exists in New York as regards the question whether the state or the individual is the owner of the beds of the waterways in general, and especially of lake beds. This condition is due in most part to the great differences in topography between this country and state and the countries in which the systems of law existing at the time of the settlement of this country originated. The English common law, adapted as it was to short rivers having their outlet into the sea and small inland lakes, has as the basis of state ownership the test as to whether the tide ebbs and flows in the waterway. If it does, the waterway is considered navigable and the crown is the owner of its bed. If not, of course the riparian proprietors are the owners.

That rule was found at an early date to contain a test too narrow to embrace our large inland freshwater lakes.¹ It seems even to have been discarded by the state courts as applying to the Mohawk River² and the Hudson River above tide water,³ as the state has been held to be the owner of the beds of those rivers, although the water is fresh and unaffected by the tide. However, the decision thus reached in the case of those rivers has later been held to have application to them alone, they having been affected by the civil law under

⁵2 Bishop, Marriage, Divorce and Separation, secs. 1607, 1609; 9 L. R. A. 505.

¹Canal Commissioners v. The People, 5 Wend. (N. Y.) 423 (1830).

²The People v. The Canal Appraisers, 33 N. Y. 461 (1865).

³Palmer v. Mulligan, 3 Caines (N. Y.) 308 (1805).

which they were granted by the Netherlands in the early days of the settlement of the country.⁴ It would seem, therefore, that as to the rivers of the state the English common law governs in general with the exceptions here noted. Having decided, however, that the English common law did not apply to our large lakes, it was necessary for the decisions on the subject to build up a system of law to govern such cases, and it is for this reason that the law on the subject is consistent with no single ancient system.

The primary test of ownership as laid down by the majority of the decisions is that the state is the owner of the beds of all *navigable* lakes.⁵ The test of navigability applied in this state is whether the waterway is navigable in fact,⁶ not having reference to whether or not the water is fresh or salt.⁷ The test applied is the civil law test as to whether it is possible to transport goods thereon from one place to another.⁸ However, this primary test is qualified by the statement that, although actually navigable, a lake is not the property of the state if it is small.⁹ The subject, therefore, seems to resolve itself into two fundamental propositions;—*first*, the state is the owner of all large navigable lakes, and *second*, the riparian owners are the proprietors of the land under all others. It would seem then, that size, if the lake in question is actually navigable, is the point upon which the decision of the particular case turns.

In applying the rule thus found, it is at once apparent that the state is the owner of the beds of the great lakes touching on its borders.¹⁰ That the state is the owner of the land under Lake Champlain is also not doubted.¹¹ The only difficulty in applying the test is encountered with respect to lakes smaller than these, yet large enough to be actually navigable for large boats, such lakes as Cayuga, Seneca, Chautauqua, Keuka, Skaneateles, and others of a surface area exceeding a few acres. The only method by which we can distinguish between large and small lakes is by examining the decisions in individual cases to ascertain where the line between them is drawn by the courts. The smallest lakes, the beds of which have been held to be the property of the state, seem to be Skaneateles¹² and Keuka,¹³ which have a surface area of approximately fifteen and twenty-two square miles, respectively. The largest which has been held to be the property of the riparians is Hemlock Lake,¹⁴ which is

⁴Smith v. The City of Rochester, 92 N. Y. 463 (1883).

⁵Ledyard v. Ten Eyck, 36 Barb. (N. Y.) 102 (1862).

⁶Morgan v. King, 35 N. Y. 454 (1866).

⁷Smith v. The City of Rochester, *supra*.

⁸Ten Eyck v. Town of Warwick, 75 Hun (N. Y.) 562 (1894).

⁹Smith v. The City of Rochester, *supra*.

¹⁰Lake Erie, Matter of City of Buffalo, 206 N. Y. 319 (1912); Lake Ontario, People ex rel. Burnham v. Jones, 112 N. Y. 597 (1889).

¹¹Champlain & St. L. R. R. Co. v. Valentine, 19 Barb. (N. Y.) 484 (1853).

¹²Sewet v. City of Syracuse, 60 Hun (N. Y.) 28 (1891).

¹³The Crooked Lake Navigation Co. v. Keuka Navigation Co., 26 N. Y. Weekly Digest 145 (1887).

¹⁴Smith v. The City of Rochester, *supra*.

about seven miles long and half a mile wide. Consistently with these decisions we find cases holding the beds of the following lakes to be the property of individuals; Lime Lake,¹⁵ Croton Lake,¹⁶ Fish Lake,¹⁷ Cazenovia Lake,¹⁸ Spring Lake,¹⁹ Greenwood Lake.²⁰ As to the large inland lakes mentioned above, it would seem that, on principle, title to the lands under them should be primarily in the state, and this does not seem to have been doubted by any of the cases. The state has assumed itself to be the proprietor of them and the decisions have not disputed this.²¹

A very interesting and somewhat bothersome question is raised as regards Seneca Lake and other lakes in the southwestern part of the state which are sufficiently large and navigable to have been in the first instance the property of the state. This question arises because of the grant by the state of New York to Massachusetts in 1786 of all property rights in land embraced in a certain portion of the southwestern section of the state,²² in which are included Lakes Keuka and Chautauqua and a part of Seneca Lake. If Massachusetts became by this grant the proprietor of the beds of these large lakes, we have one more qualification to add to the propositions stated above, as the present riparians, the grantees direct or indirect of Massachusetts, would be the owners of the beds of the large navigable lakes included in the grant. The question as to whether or not Massachusetts did become the owner of the beds of these lakes does not seem to have been directly decided, although it has been directly involved in at least one recent case.²³ The court, however, in this recent case was satisfied to dispose of the case in the state's favor on another ground and consequently the question seems still to be a fairly open one on principle.

The case of *Smith v. The City of Rochester*,²⁴ while not definitely deciding the point, lays down principles which, if consistently interpreted, would seem to lead to the conclusion that property in the beds passed to Massachusetts. The court says in part: "Subsequent to this treaty there remained in the State of New York only such rights of property in these lands as necessarily pertained to its sovereignty and were inalienable by the sovereign. All such property rights in or to the property in dispute *as could by the most absolute conveyance* be granted to another were, by this treaty conferred upon the Commonwealth of Massachusetts and its grantees."²⁵

¹⁵*Hazleton v. Webster*, 20 App. Div. (N. Y.) 177 (1897).

¹⁶*Gouverneur v. National Ice Co.*, 134 N. Y. 355 (1892).

¹⁷*Wilcox v. Bread*, 92 Hun (N. Y.) 9 (1895).

¹⁸*Ledyard v. Ten Eyck*, 36 Barb. (N. Y.) 102 (1862).

¹⁹*Calkins v. Hart*, 64 Misc. (N. Y.) 149 (1909).

²⁰*Ten Eyck v. Town of Warwick*, *supra*.

²¹*Laws of 1827*, Chap. 150 sec. 2; *Village of Mayville v. Willcox*, 61 Hun (N. Y.) 223 (1891).

²²By this grant the state of New York ceded and granted to the state of Massachusetts "the estate, right, title and property (the right and title of government, sovereignty and jurisdiction excepted) which the state of New York hath of, in and to 230,400 acres to be located, . . . and also of, in and to all the lands and territories *within the following limits and bounds*."

²³*City of Geneva v. Henson*, 195 N. Y. 447 (1909).

²⁴92 N. Y. 463 (1883).

²⁵At page 476.

The court, then, in stating those property rights which are inalienable by a sovereign does not mention ownership of the lake beds as one.

It is conceded that a sovereign may pass title to the beds of its navigable waters, even to individuals.²⁶ It is also conceded that, as a grantee, the State of Massachusetts was at least in as good a position as an individual.²⁷ The only question, therefore, arises over the construction of a conveyance of land by a sovereign, where it is claimed, as in this case, that title to the beds of navigable waters has passed. The claim is that the state will not be held to have intended to pass title to lands under water unless the grant expressly so provides. However, the cases most often cited in support of this claim lay down as law the proposition that where a grant of land from a sovereign is described as "*bounded by*" navigable waters, title to the beds of these waters will not pass, and they do not appear to apply the principle to any other cases.²⁸ The grant to Massachusetts contained no such words of description and it would seem, therefore, that the rule of *Rogers v. Jones*²⁹ should apply, namely, that, "when a patent or grant conveys a tract of land by metes and bounds, the land under water as well as other land will pass if the land under water lies within the bounds of the grant." This rule should apply more strongly, it seems, since the law is well settled that the strict rule of interpretation, mentioned above, will not be applied to a conveyance made by a sovereign for a valuable consideration,³⁰ and a compromise of a disputed claim has always been held to be consideration sufficient to support any contract.

It would, therefore, seem that on pure legal principle property rights in the beds of these lakes should be held to be in the riparian proprietors, although, should such be the decision of the courts, a peculiar situation would arise, as the state has at all times assumed itself to be the owner of the lands under all its large lakes. A method used by the courts in evading this issue is illustrated in the *City of Geneva v. Henson*,³¹ where the court says that, whether or not New York State owns the beds of the lake in question, the individual does not, as the words of his grant from another individual were not broad enough to be held to convey title to the bed of the lake in question. It seems that the courts can by this means keep virtual title in the state, as only the riparian owners are interested in the ownership of the beds of the waterways.

The recent decision of *Calkins v. Hart*³² lays down the rule by which the proportion of the beds of the lakes owned by the riparians

²⁶Matter of Mayor, etc., of City of New York, 182 N. Y. 361 (1905).

²⁷Burbank v. Fay, 65 N. Y. 57 (1875).

²⁸Sage v. The Mayor, 154 N. Y. 61 (1897); Matter of Mayor, etc., of City of New York, 182 N. Y. 361 (1905).

²⁹1 Wend. (N. Y.) 238 (1828).

³⁰3 Washburn, Real Property (3d ed.), 172; Langdon v. Mayor etc., of City of New York, 93 N. Y. 129 (1883).

³¹195 N. Y. 447 (1909).

³²64 Misc. (N. Y.) 149 (1909).

may be ascertained. That case, after stating that the subject was a new one as far as the decisions of this state are concerned, and after discussing the rule in use in other states, lays down the following as the arbitrary rule to be used: "Each abutting owner is entitled to the land under water in front of his premises to the thread of the lake. Where * * * * * there is no outlet or inlet, this thread passes through the center of the lake along its longest diameter. In this particular instance there are no deep bays or inlets to complicate the question. Where such exist the rule with regard to streams may still be the guide. A line will be drawn from the center of the lake through the thread of such bays or inlets to their extremity, just as a line is drawn from the center of a stream through the center of its tributaries."

M. B. Doing, '16.

Restraint of Trade: Price Regulation Schemes: Interpretation of Sec. 2 of the Clayton Law.—The recent decision in *Great Atlantic & Pacific Tea Co. v. The Cream of Wheat Co.*, 224 Fed. 566 (1915), the first case to arise under sec. 2 of the Clayton Act,¹ is of interest to the observers of the development and construction of the federal laws against monopolies and restraint of trade.

The plaintiff is the owner of a considerable number of grocery stores over the Middle and Eastern States, known in many places as "economy stores," stores which have only a single attendant, extend no credit, and make no deliveries, thus having a maintenance charge smaller than other ordinary groceries which provide the public with greater conveniences. The defendant sold its product to the plaintiff at wholesale prices, upon condition that in making sales over the counter no smaller price should be charged than fourteen cents a package. This is the standard retail price at which all retailers are requested by the defendant to sell. The plaintiff, notwithstanding this condition, has been selling at twelve cents a package and, on this account, the defendant company has refused to supply the plaintiff with any more Cream of Wheat.

This action was commenced by a bill for a temporary injunction under sec. 16 of the Clayton Law to restrain the defendant from carrying out the above described system of sales, and from cutting off the plaintiff's supply of Cream of Wheat, which acts are alleged to constitute a violation of sec. 2 of the same act.²

¹Act Oct. 15, 1914, c. 323, 38 Stat. 730.

²"Sec. 2. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, where the effect of such discrimination may be to *lessen competition or tend to create a monopoly in any line of commerce* And provided, further, that nothing herein contained shall prevent persons engaged in selling goods, wares or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade."

The court held that the acts sought to be restrained by the plaintiff did not come within this section because:

1. Said acts or scheme *did not tend to create a monopoly*, for the defendant had already a monopoly,—a lawful monopoly, in the product known as Cream of Wheat, secured and protected by the trade mark laws and the more general rules against unfair competition.

2. Because this price regulation scheme *did not substantially lessen competition* within the meaning of the section. It is not unlawful, the court said, "to prevent any and every species of competition or to restrain trade in any and every degree. The only competition prevented or sought to be prevented by the defendants' act is that of Cream of Wheat against itself." The contention of the court is that competition in an article of commerce which is only a limited portion of a general commodity, in this case wheat "middlings," is not the kind of competition encouraged by the statutes; that to restrain competition in Cream of Wheat is a different thing from restraining competition in wheat "middlings" in general. The latter would, of course, be unlawful. The court cites in support of this view the case of *Fisher Flouring Mills Co. v. Swanson*.³

The court stated that this same argument applies to the clause "*and not in restraint of trade*" in the proviso specifying that nothing in the section shall prevent persons engaged in commerce from selecting their customers in *bona fide* transactions and not in restraint of trade. This meant an unreasonable restraint of trade, there being nothing in the Clayton Act to compel or induce the courts to hold that a different restraint of trade is meant than the one which now obtains under the Sherman Act. The court held that the restraint in this case was reasonable, and hence not covered by the act, because it was a restraint in competition in an article which constitutes only a limited portion of the whole supply.

It is not the purpose of this note to discuss the questions raised in the case, as to whether Congress has the power to compel the defendants to sell Cream of Wheat to the plaintiffs, whether the Cream of Wheat Company has attempted to fix prices, or whether this case could be brought, strictly speaking, under the Sherman Law.

³76 Wash. 694 (1913). This was an action to enjoin the defendant from selling a special brand of flour known as Fisher's Blend of Patent Flour at a price below a standard retail price that the defendant had agreed to maintain. This agreement was held to be a reasonable restraint of trade and consequently valid, the reason being that inasmuch as the plaintiff was not trying to fix a standard price in a commodity over which he exercised a monopoly, but merely on a special brand of high grade flour, he should be protected in his efforts to maintain the excellence of his flour against the retailer "who cuts prices for his own ulterior purposes," making up the loss "by the sale of other articles at or above their reasonable price." The public, therefore, alone is injured through the manufacturer's inability in the face of cut prices to maintain the excellence of his product.

This same argument was presented in *Grogan v. Chaffee*, 156 Cal. 611 (1909), a case of price regulation in a special brand of high grade olive oil, and in *D. Ghirardelli Co. v. Hunsicker*, 164 Cal. 355 (1912), where agreements to maintain a standard price for Ghirardelli ground chocolate were sustained.

The scope of this note is limited to discussing the view taken by the court of sec. 2 of the Clayton Act. This view, it is submitted, is too narrow and not in accord with the policy and tendency of the federal decisions on this question.

The terms of the Clayton Law are to be interpreted, it is true, in the light of their common law significance, as rightly suggested by the court, but such interpretation as has been given to them in this case is not the correct one under the common law.

In the first place, it is admitted, as the court correctly states, that the acts of the defendant did not tend to create a monopoly, for the defendant had a lawful monopoly in the production and sale of Cream of Wheat. But this is an immaterial consideration, for the case does not depend solely on the question whether the creation of a monopoly was sought to be attempted but, also on the question whether there was an attempt substantially to lessen competition in restraint of trade which is condemned also by the section. Moreover the fact that a lawful monopoly existed in itself does not give an inherent right to regulate prices once the title to the article monopolized has passed by sale, not even in cases of monopolies conferred by statute by virtue of the patent and copyright laws.⁴

Therefore, discussing the material question, it is submitted that the competition sought to be restrained among the retailers in this case was a substantial lessening of competition and an unreasonable restraint of trade. As this is the first time that this very question has been presented in a federal tribunal, we can only be guided in its determination by the principles governing the law on this subject. It has come to be the settled policy of the common law as administered by the federal courts and generally that what determines whether an agreement in restraint of trade is reasonable or not is, *in the first place*, the interest of the public, and, in the second place, the interests of the contracting parties.⁵

It is against the interests of the public, it is submitted, to have competition suppressed in this case. This competition will compel retailers to reduce the price of the article as near as they can to the amount that will still leave margin for their legitimate selling profit. This competition will fix the price according to the true economic laws of supply and demand. It has always been the strong tendency of the common law to encourage competition and declare unlawful and unenforceable contracts in restraint of trade. "The whole economic system," says Lurton, J., in *J. D. Parks & Sons Co. v. Hartman*,⁶ "which has made our civilization is founded upon the theory that competition is desirable and the common law rules against restraint of trade rest upon this foundation." So strong has

⁴*Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911); *Bobbs-Merrill Co. v. Straus*, 210 U. S. 339 (1908); *Bauer v. O'Donnell*, 229 U. S. 1 (1913).

⁵*Gibbs v. Baltimore Gas Co.*, 130 U. S. 396, 409 (1889); *Dr. Miles Medical Co. v. Park & Sons*, 220 U. S. 373 (1911); *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211 (1899).

⁶153 Fed. 24, 44 (1907).

been this tendency of the common law against restraint of trade that the only well recognized exceptions have been in case of a principal lawful contract of sale of good will or concerning the making or dissolution of a partnership, where, incidental to this main contract, there is an agreement to protect the buyer of the good will of a business or the remaining partner from competition by the former owners or outgoing partners. This agreement, if strictly for the protection of such buyer or remaining partner, is valid both at common law and under the statutes, because it affects no public interest and is necessary for the protection of one of the parties.

Especially is this price regulation scheme against the interests of the public when one considers the facts and circumstances of this particular case. The plaintiffs did not lower the price of Cream of Wheat in order to attract customers, as was the case of *Fisher Flouring Mills Co. v. Swanson*, *supra*, but because that was the very basis of the plaintiff's business. Its "economy stores" could only compete with those providing the public with more conveniences because of their low prices. In fact, the upholding of this standard price would result in compelling the plaintiff to sell Cream of Wheat at a price in excess of that necessary to make a reasonable selling profit. It seems, therefore, that the interest of the consuming public is to have these stores free from any standard price agreements, where articles may be bought cheaper at a little more inconvenience, if the public so desires.

Yet the court argues, on the strength of the *Flouring Mills Company* case that it is for the interest of the public to protect high grade products from ruinous competition among themselves. Admitting that to be true, it has not been satisfactorily shown in either case how this competition would so seriously injure the producer's business as to prevent him from maintaining the excellence of his products. In the principal case that portion of the public,—the great majority, which deals with ordinary groceries on account of their greater conveniences, as a matter of fact, continues and will continue to do so and to pay fourteen cents for the package of Cream of Wheat. In the *Flouring Mills Company* case the occasional local "cut rate" practice of the defendant could not injure the plaintiff's business, if the high price of its products is strictly the result of its higher quality.

Ramón Siaca, Jr., '16.

Sales: Breach of Warranty in Conditional Sale.—The recent case of *Peuser v. Marsh*, 167 App. Div. (N. Y.) 604 (1915), presents a somewhat novel situation in regard to recoupment under the sales Act. There had been a conditional sale of a piano, the purchase price of which was two hundred and fifty dollars. The buyer having made defaults in his payments, the piano company attempted to retake the piano, but the buyer refused to deliver it up. In an action of replevin for the piano the defendant set up in defense a breach of warranty by the seller. His defense rested on the theory

that by sec. 150 of the New York Personal Property Law¹ he was given the right to keep the property and set up the breach of warranty in recoupment so as to defeat the plaintiff's recovery. It was conceded that no action for the breach of warranty could be maintained before the property had passed² and that, prior to the adoption of the Sales Act, recoupment in such a case as this would not have been allowed. But it was claimed that sec. 150 changed the common law rule.

The court upheld the defendant in these contentions and overrules a demurrer to the defense by way of recoupment. It was argued by the court that the damage resulting from the breach of warranty was to be considered as payment and, therefore, that the title had passed. Another defense of counterclaim for the breach was held demurrable, however, on the ground that the breach of warranty could only be set up by way of recoupment.

The question involved, then, is whether, in an action of replevin brought by a conditional vendor after default in payment by the buyer, the damages occasioned by a breach of warranty can be set up as payment by the buyer.

The opinion goes into the definition of "recoupment" at great length, but it is enough to say that in practically all definitions of the remedy it is referred to as a "mitigation of damages"³ and it is so referred to by the draftsman of the act in his discussion of sec. 150.⁴ Courts generally have been very loose in their use of the terms "recoupment," "set-off," and "counterclaim," very often using them interchangeably. However, the remedies are not the same and the distinctions between them should be observed. Recoupment is confined to matters arising out of and connected with the transaction upon which the suit is brought and cannot result in an affirmative judgment, while set-off and counterclaim are not so limited. Again in recoupment and counterclaim the sum need not be liquidated, while in set-off the amount must be liquidated. Where recoupment

¹Section 150 of the New York Personal Property Law is an adoption of section 69 of the American Uniform Sales Act which reads, in part, as follows: "Where there is a breach of warranty by the seller the buyer may at his election, accept or keep the goods and set up against the seller the breach of warranty by way of recoupment in diminution or extinction of the price. . . ."

²*Spaus v. Stolwein*, 75 Misc. (N. Y.) 1 (1911); *Osborn v. Gantz*, 60 N. Y. 540 (1875); *English van Hanford*, 75 Hun (N. Y.) 428 (1894); *Roach v. Curtis*, 115 App. Div. (N. Y.) 765 (1906); *Lewis v. Pope Motor Car Co.*, 202 N. Y. 402 (1911); and also see *Benjamin, Sales* (7th Ed.), 662.

³See definitions in principle case and also *McCullough v. Cox*, 6 Barb. (N. Y.) 386-391 (1849); *Ives v. Van Epps*, 22 Wend. (N. Y.) 154 (1839); *Hurst v. Everett*, 91 N. C. 399, at page 404 (1884); 34 Cyc 623; *Waterman, Set-off* (2nd Ed.), 489; *Civ. Code Ga.* (1895) sec. 3756; *Pomeroy, Remedies and Remedial Rights* (3rd Ed.), sec. 731.

⁴*Williston, Sales*, sec. 605.

⁵*Dearing Boiler Co. v. Thompson*, 156 Mich. 365 (1909), and the note thereto in 24 L. R. A. (N. S.) 748; *Chitty, Contracts*, 1266-1268; *Wells, Replevin* sec. 630; *Cobbey, Replevin*, sec. 791; *Pomeroy, Code Remedies* (4th Ed.) sec. 607.

has been discussed it has generally been held that it could not be set up in replevin.⁵

However, it is claimed in the opinion in *Peuser v. Marsh* that the common law rule has been changed by sec. 150 so as to allow the allegations of the defendant. There are no cases on the subject, so that the interpretation of the statute must be argued on principle. It would seem strange that, if the statute was meant to change the common law in the particular above stated, the draftsman of the act in his book discussing the subject⁶ should make no mention of the fact. Of the other two writers on the subject, one⁷ makes no mention of a change, while the other⁸ states that, with the exception that it preserves to the buyer a right of action for damages after acceptance, "it seems to declare the common law." In the opinion of the court it is stated that the provision is useless if held only to apply to an action for the price, as the buyer already had that right. This contention, it would seem, is of little weight when it is considered that many of the provisions of the Sales Act are merely declaratory of the common law and for the further reason that the section does change the common law in the particular mentioned above. It is a well known principle of law that statutes in derogation of the common law are to be strictly construed.⁹ The section in question makes no express mention of the change in the common law which the court discovers. By the use of the word "recoupment" the section limits itself, excluding replevin actions, and so it would seem that a decision claiming that it does change the common law conflicts with the rule that the common law is not to be changed any further than a fair construction of the statute requires and that a change or repeal by implication is not favored.¹⁰

That it was the intention of the parties to the contract that a breach of warranty be considered as payment seems highly improbable. Till the property had passed there could have been no action for the breach of warranty and until the payment of the price the property would not pass. If, therefore, no right of action existed in the defendant, there would be no ground for recoupment and so no ground for stating that payment had been made by the damages, since legally the damages could not arise until after the payment had been made.

It would seem, furthermore, that recoupment must be set up as a counterclaim under the New York Code of Civil Procedure.¹¹ A counterclaim must be a complete cause of action.¹² Therefore,

⁶Williston, Sales sec. 605.

⁷Burdick, Sales (3rd Ed.).

⁸Bogert, The Sale of Goods in New York, sec. 150.

⁹Bertles v. Nunan, 93 N. Y. 152 (1883).

¹⁰Matter of Winne, 2 Lansing (N. Y.) 21 (1870).

¹¹Deeves and Son v. Manhattan Life Ins. Co., 195 N. Y. 324 (1909) at pages 332-333.

¹²New York Code Civ. Proc., sections 397 and 500; Cragin v. Lovell, 88 N. Y. 258 (1882); Bernascheff v. Roeth, 34 Misc. (N. Y.) 588 (1901).

since the breach of warranty was not a cause of action until title passed, it would seem logical that it could not be pleaded by way of counterclaim, and that it could not be so pleaded the court admitted.

Undoubtedly there was equity in administering relief to both plaintiff and defendant in one action, as was done, but it would seem difficult to defend the course pursued upon strict legal theory.

Frank B. Ingersoll, '17.

Titles to Realty: Marketability of Title as Affected by Encroachments on Street.—Can the owner give a good title to land on which is situated a building which encroaches on a street? The case of the *Acme Realty Co. v. Schinasi*, 215 N. Y. 495 (1915), holds that a contract for the sale of such property is not enforceable. Certain oriel and bay windows encroached one foot on the street and a stoop four feet. The court rests its decision on the ground that there is a defect in the marketable title, since the city might at any time require the removal of the encroachments, which would entail great expense.

"The authorities hold that to render a title marketable it is only necessary that it shall be free from *reasonable doubt*; in other words, that a purchaser is *not* entitled to demand a title absolutely free from every possible technical suspicion. He can only demand such title as a reasonably well informed and intelligent purchaser, acting on business principles, would be willing to accept."¹ It is a substantial, not a technical, defect that is necessary to render a title unmarketable.

A covenant of seizin is not broken when a building extends over on adjoining property or on the street, for the vendor has good title to the land according to the description by metes and bounds,² but this does not mean that he has a marketable title. The deed purports to pass title to the land and the buildings situated thereon. In fact the title to only that part of the building is passed which is located on the land conveyed. The vendee receives, then, a defective building with the possibility of being required to remove that part of the building which constitutes a continuing trespass on the land adjoining. This defect is substantial only when the owner is required to remove the encroachment.

If the title is a marketable one it must be such that the owner will not be subjected to litigation to defend it.³ "The doubt, to avail as a defense, must be a reasonable one, and rests upon some debatable ground. A bare possibility of litigation does not render

¹*Cummings v. Dolan*, 52 Wash. 496 (1909); and to the same effect; *Miller v. Cramer*, 48 S. C. 282 (1896); *Vreeland v. Blauvelt*, 23 N. J. Eq. 483 (1873); *Street v. French*, 147 Ill. 342 (1893); *Gill v. Wells*, 59 Md. 492 (1882); *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400 (1871); *Empire Realty Corp. v. Sayre*, 107 App. Div. (N. Y.) 415 (1905).

²*Steam v. Hesdorfer*, 9 Misc. (N. Y.) 134 (1894).

³*Bodcaw Lumber Co. v. White*, 121 La. 715 (1908); *Zane v. Weintz*, 65 N. J. Eq. 214 (1903); *Fleming v. Burnham*, 100 N. Y. 1 (1885); *Downey v. Seib*, 102 App. Div. (N. Y.) 317 (1905); *Herman v. Somers*, 158 Pa. St. 424 (1893); *Lindsey v. Humbrecht*, 162 Fed. (U. S.) 548 (1907).

a title doubtful."⁴ If the law were otherwise and the mere possibility of litigation rendered the title unmarketable, the city's policy as to allowing encroachments on the street would be of no importance, for the title would be unmarketable because of the city's right to require a removal, irrespective of the probability of the exercise of the right. Therefore, the marketable nature of the title to the property where a building encroaches on the street depends on the city's policy in allowing such encroachments to continue.

The case of *Broadbelt v. Loew*⁵ comes to a conclusion contrary to that in the *Acme Realty Company* case, though the facts are very similar, the bay windows there extending about seven and one-half inches and the stoop over six feet into the street. Specific performance was there granted. In both cases the owners had obtained permission from the proper authorities to build on the street. In both it was conceded that the city had a right to revoke this authority at any time.⁶ In the *Broadbelt* case, however, decided in 1900, the possibility of interference on the part of the city was considered by the court to be so remote that it did not constitute a burden. The principles of law laid down are the same in both cases, but since 1900 the policy of the city has so changed that the courts can no longer rely on its inactivity. This change is marked by several cases which have reached the Court of Appeals,⁷ where the encroachments are considered as public nuisances, interfering with the public use, and where causing special damage to an individual, as private nuisances.⁸

Empire Realty Corp. v. Sayre,⁹ decided in 1905, refers to an act of the state legislature passed in 1899,¹⁰ prohibiting the city from requiring the removal of encroachments of less than ten inches in the case of buildings *then standing*, unless the action were brought within one year after the passage of the act. The building involved in that case was erected in 1899-1900, after the act was passed, and so was not directly affected by it. In the *Acme Realty Company* case no mention is made of this statute and the case may be treated as concerning a building erected subsequent to 1899. Therefore, it is only the city ordinances that need be considered, and these it is conceded carry with them an authority which may at any time

⁴36 Cyc. 633, supported by *Garden City Sand Co. v. Miller*, 157 Ill. 225 (1895); *Stevenson v. Polk*, 71 Iowa, 278 (1887); *Grasers v. Blank*, 110 La. 493 (1903); *Conley v. Finn*, 171 Mass. 70 (1898); *Batt v. Mallon*, 151 Mass. 477 (1890); *Dow v. Whitney*, 147 Mass. 1 (1888); *Hayes v. Harmony Grove Cemetery*, 108 Mass. 400 (1871); *Vreeland v. Blauvelt*, 23 N. J. Eq. 483 (1873); *Cambrelleng v. Purton*, 125 N. Y. 610 (1891); *Webb v. Chisolm*, 24 S. C. 48 (1885); *Cattell v. Corral*, 4 Y. & C. Ex. (Eng.) 228 (1840).

⁵15 App. Div. (N. Y.) 343, aff'd, 162 N. Y. 642 (1900).

⁶*Deshong v. City of New York*, 176 N. Y. 475, 483 (1903).

⁷*Ackerman v. True*, 175 N. Y. 353 (1903); *City of New York v. Rice*, 198 N. Y. 124 (1910).

⁸*Deshong v. City of New York*, 176 N. Y. 475, 483 (1903); *Hoey v. Gilroy*, 129 N. Y. 132 (1891).

⁹*Empire Realty Corp. v. Sayre*, 107 App. Div. (N. Y.) 415 (1905).

¹⁰Gen. Laws of N. Y. (1899), Chap. 646, which supersedes a similar statute passed in 1896.

be revoked. In 1908 specific performance was granted in the case of *Fifth Ave. Co. v. Lotus Club*,¹¹ where there was an encroachment of seven inches of a part of a building that was unnecessary and could be removed at a nominal expense. The encroachment had existed without objection for thirty-five years. In that case, however, there was a vigorous dissenting opinion on the ground that there *was* a material encroachment and that the act of the legislature creating a short statute of limitations in these cases was unconstitutional. The dissenting opinion cites *Ackerman v. True*¹² which held that the right of the public to the free use of the street could not be alienated and that an encroachment on the street amounts to a public nuisance. The legislature may authorize the city to permit an encroachment that does not amount to a nuisance.¹³

It is interesting to note that the cases, where the encroachment is on the land of an adjoining owner, are quite unanimous in their holdings that such an encroachment renders the title to both the land encroached on¹⁴ and the land on which the building is located,¹⁵ unmarketable. The encroachment on adjoining land does not affect the marketable title, if the right has been acquired by adverse possession,¹⁶ but an owner cannot acquire a right to a part of the street by any period of adverse possession.

The reason that there is no good marketable title in these cases is that the owner of the adjoining land may at any time require the removal of the encroachment, which would necessarily entail expense. The ground of decisions in cases of encroachments on the street is the same. In the earlier ones where specific performance was granted the chance of the city's interference was considered too slight to constitute a menace and the later decision merely follows the changes in the city's policy. Now the chance of interference makes the title unmarketable.¹⁷

Don C. Allen, '16.

Torts: Non-contractual obligation for negligence in furnishing a dangerous article.—As a general rule a manufacturer or vendor is not liable to persons with whom he has no contractual relations for injuries resulting from his negligence in manufacturing or selling

¹¹129 App. Div. (N. Y.) 339 (1908); accord, *Van Horn v. Stuyvesant*, 50 Misc. (N. Y.) 432 (1906).

¹²175 N. Y. 353 (1903).

¹³*People v. Keating*, 168 N. Y. 390 (1901).

¹⁴*Elinsky v. Berger*, 87 App. Div. (N. Y.) 584 (1903); *Kaplan v. Bergmann*, 122 App. Div. (N. Y.) 876 (1907).

¹⁵*Wilhelm v. Federgreen*, 157 N. Y. 713 (1899); *Steckler v. Godillot*, 17 Misc. (N. Y.) 286 (1896).

¹⁶*Harrison v. Platt*, 35 App. Div. (N. Y.) 533 (1898).

¹⁷The city's policy is controlled by the city officials. Therefore, the marketable title is dependent on the attitude of these officials. History shows that this is not dangerous. The city's policy has undergone a slow change as the result of its growth and expansion and has not been affected by the whims of the officials who chanced to be in power.

the article causing the injury.¹ To this rule there are, however, three distinct exceptions. The recent case of *Quackenbush v. Ford Motor Co.*, 167 App. Div. (N. Y.) 433 (1915), illustrates one of these exceptions. In that case, action was brought for injuries resulting from the negligence of the motor company in failing to equip an automobile with suitable brakes, and in negligently assembling it, with the result that it could not be controlled and ran over an embankment. There was no contractual relation between the plaintiff and defendant, the plaintiff having purchased the automobile through an agent of the manufacturer to whom it had been sold. But it was held that the complaint stated a cause of action, under the first exception named below.

The first exception to this rule is that one is liable for injuries resulting from the negligence in the manufacture, construction, or sale of an article which is of itself, or by construction rendered, an imminently dangerous article.² It does not necessarily follow from this that the article must be inherently dangerous. The leading example of this sort of case is *Thomas v. Winchester*,³ in which a druggist sold belladonna, a deadly poison, and labeled it dandelion. The more usual conditions and the one on which the *Quackenbush* case rests, is where the article has been rendered imminently dangerous by the negligence of the defendant.⁴

The second exception is where the defendant has sold or manufactured an article which he knows to be dangerous by reason of some concealed defect. Here the essence of the wrong is fraud. Probably the best recent case on this subject is *Kuelling v. Roderick Lean Manufacturing Co.*⁵ There the defendant sold a land roller, the tongue of which was rendered defective by a hole which the defendant had filled and polished so that it resembled the rest of the wood and was therefore unnoticeable.⁶

The third exception occurs where the defendant invites the plaintiff to enter on his premises and use his appliance, and then the plaintiff

¹*Losee v. Clute*, 51 N. Y. 494 (1873); *Loop v. Litchfield*, 42 N. Y. 351 (1870); *Barrett v. The Singer Manufacturing Co.*, 32 N. Y. Super. Court. 545 (1869); *Robertson v. Fleming*, 4 Macq. H. of L., Cas., 167, 209 (1861).

²*Quackenbush v. Ford Motor Co.*, 167 App. Div. (N. Y.) 433 (1915); *Statler v. Ray Manufacturing Co.*, 195 N. Y. 478, 481 (1909); *Robertson v. Fleming*, *supra*; *Heaven v. Pender*, 11 Q. B. Div. 503, 517 (1883); *Kahner v. Otis Elevator Co.*, 96 App. Div. (N. Y.) 169, *aff'd*, 183 N. Y. 512 (1905); *Thomas v. Winchester*, 6 N. Y. 397 (1852); *Willey v. Mynderse*, 165 App. Div. (N. Y.) 620 (1915); *Devlin v. Smith*, 89 N. Y. 470 (1882); *Connors v. Great Northern Co.*, 90 App. Div. (N. Y.) 311 (1904); *Barrett v. Lake Ontario Co.*, 174 N. Y. 310, 314 (1903); *Coughtry v. Globe Woolen Co.*, 56 N. Y. 124 (1874); *Torgesen v. Schultz*, 192 N. Y. 156 (1908); 29 Cyc. 484.

³6 N. Y. 397 (1852).

⁴*Coughtry v. Globe Woolen Co.*, *supra*; *Quackenbush v. Ford Motor Co.*, *supra*; *Statler v. Ray Manufacturing Co.*, 195 N. Y. 478 (1909); *Kahner v. Otis Elevator Co.*, 96 App. Div. (N. Y.) 169, *aff'd*, 183 N. Y. 512 (1905); *Dixon v. Bell*, 5 Mau. & Sel. 198 (1816); *Schubert v. Clark*, 49 Minn. 331 (1892); *Thompson, Negligence*, sec. 825.

⁵183 N. Y. 78 (1905).

⁶*Longmeid v. Holliday*, 6 Ex. (Eng.) 761 (1851); *Wellington v. Downer Kerosene Co.*, 104 Mass. 64 (1870); *Huset v. Case Threshing Machine Co.*, 120 Fed. 865 (1903).

is injured by reason of a defect in that appliance caused by the defendant's negligence.⁷

The case of *Losee v. Clute*,⁸ would seem at first glance not to be in accord with the principles stated above. In that case the injury was occasioned by the bursting of a boiler which had been rendered defective through negligent construction by the defendant. The case, however, was decided on the authority of *Loop v. Litchfield*,⁹ which went on the ground that the flywheel, which in that case caused the injury, was not an imminently dangerous mechanism. It seems, therefore, that *Losee v. Clute* must be considered as going on the ground that the boiler was not an imminently dangerous article and that therefore the general rule applied.

The non-contractual duty of a manufacturer to a third person is a duty imposed by law and owed to all persons in whose presence the machine is to be used.¹⁰ It is maintained by some courts to be a duty owed to the public,¹¹ while others maintain equally stoutly that there is no public duty.¹² The duty must be considered a duty imposed by law for the special exigencies of the respective cases.

Henry Klauber, '17.

Torts: Secondary Boycott.—The recent case of *Auburn Draying Co. v. Wardell* 89 Misc. (N. Y.) 501, (1915) concerns a boycott led by the defendants, representing local and central labor unions, against the plaintiff, engaged in the trucking business, who had refused to advise or compel the employees of his company to join the local teamsters' union. A systematic, concerted campaign was inaugurated for the purpose of withdrawing the patronage of the plaintiff's customers—the ordinary secondary boycott without resort to violence or misrepresentation of facts. Unfair lists containing the plaintiff's name were circulated among customers, urging the cessation of business relations with the plaintiff. The defendant's acts and threats to cause strikes among those customers who failed to comply with these demands resulted in damage to the plaintiff. It was held by the Supreme Court at Special Term that such acts constituted a conspiracy injurious to trade and commerce within the meaning of the Penal Law, sec. 580, subds. 5 and 6, and that the plaintiff was consequently entitled to an injunction and damages.

The underlying principles applicable to the subject of the peaceful boycott are at present in a nebulous stage in American jurisdictions generally, and according to the New York court,¹ law "does not seem to have been so clearly settled in this state by its court of last

⁷Coughtry v. Globe Woolen Co., 56 N. Y. 124, 126 (1874); Heaven v. Pender, L. R., 11 Q. B. Div. 503 (1883).

⁸51 N. Y. 494 (1873).

⁹42 N. Y. 315 (1870).

¹⁰Pa. Steel Co. v. Elmore, 175 Fed. 176 (1909); Marquardt v. Ball Engine Co., 122 Fed. 374 (1903).

¹¹Quackenbush v. Ford Motor Co., 167 App. Div. (N. Y.) 433 (1915).

¹²Devlin v. Smith, 89 N. Y. 470 (1882); Kahner v. Otis Elevator Co., 96 App. Div. (N. Y.) 169, aff'd, 183 N. Y. 512 (1905).

¹89 Misc. (N. Y.) 501, 508.

resort as to leave no ground for uncertainty." Conceding the legality of strikes² and primary boycotts,³ courts have generally declared the secondary boycott⁴ illegal, on the ground that a combination for the purpose of inflicting harm upon an obnoxious person, by coercing others not directly involved in the dispute to injure such person, constitutes a conspiracy at common law.⁵ "An act harmless when done by one, may become a public wrong when done by many acting in concert, for then it takes on the form of a conspiracy * *."⁶ In essence a conspiracy is the agreement of several persons acting in combination to accomplish an unlawful purpose, using either lawful or unlawful means.⁷ Conspiracies in the form of boycotts are condemned, under the prevailing view, on the theory that they unjustifiably interfere with a property right, namely, the right to pursue a lawful business.⁸

The New York statute codifies the common law principles applicable to conspiracies and provides as follows:⁹ "If two or more persons conspire * * To prevent another from exercising a lawful trade or calling * * by force, threats, intimidation * * or, To commit any act injurious to trade or commerce, each of them is guilty of a misdemeanor."¹⁰ The statute in application has been extended to boycotts, usually in cases where the purposes of the combination were manifestly unlawful or the means used bordered upon actual violence.¹¹

Regarding every wilful injury as *prima facie* wrongful but justifiable under certain circumstances,¹² it becomes material to inquire into

²Nat. Prot. Ass'n v. Cummings, 170 N. Y. 315 (1902), and cases there cited.

³Mills v. U. S. Printing Co., 99 App. Div. (N. Y.) 605 (1904), aff'd, 199 N. Y. 76 (1910), adopted in Lindsay v. Mont. Fed. of Labor, 37 Mont. 264 (1908); Foster v. Retail Clerks Ass'n, 39 Misc. (N. Y.) 48 (1902).

⁴See definitions by Taft, J.; Toledo A. A. & N. M. Ry. Co. v. Penn. Co., 54 Fed. 730, 738 (1894); Thomas v. Cinn. N. O. & T. P. Ry. Co., 62 Fed. 803, 818 (1894); also see State v. Glidden, 55 Conn. 46 (1887); H. L. Laidler, "Boycotts and the Labor Struggle," (1913), pp. 60-68.

⁵Quinn v. Leathem, (1901) L. R. App. Cas. (Eng.) 495; Gray v. Bldg. Trades Council, 91 Minn. 171 (1903).

⁶Latest enunciation in Eastern States Lumber Ass'n v. U. S., 234 U. S. 600, 614 (1914); Accord: Arthur v. Oakes, 63 Fed. 310 (1894); Gompers v. Bucks Stove & R. Co., 221 U. S. 418 (1910). *Dissent*: by Holmes, J., Vegelahn v. Guntner, 167 Mass. 92 (1890); Mitchell, J., Bohn Mfg. Co. v. Hollis, 54 Minn. 223 (1893); Caldwell, J., Hopkins v. Oxley Stave Co., 83 Fed. 912 (1897). See Andrews, J., Foster v. Retail Clerk Ass'n, *supra*.

⁷Mitchell v. Hitchman C. & C. Co., 214 Fed. 685 (1914), citing Pettibone v. U. S., 148 U. S. 197 (1893).

⁸Loewe v. Lawlor, 208 U. S. 274 (1908), aff'd., 235 U. S. 522 (1915); People v. Barondess, 61 Hun (N. Y.) 571, aff'd, 133 N. Y. 649 (1892); Newton v. Erickson, 70 Misc. (N. Y.) 291, aff'd, 144 App. Div. (N. Y.) 939 (1911), followed in Bossert v. Dhuy, 166 App. Div. (N. Y.) 251 (1914).

⁹N. Y. Penal Law, sec. 580, subs. 5, 6.

¹⁰For historical development of the statutes, see G. G. Groat, "Trade Unions and the Laws in New York" (1905); F. J. Stimson: "Popular Law-making" (1912).

¹¹People v. Wilzig, 4 N. Y. Cr. R. 403 (1886); People v. Kosta, 4 *ibid.* 429 (1886); People v. McFarlin, 43 Misc. (N. Y.) 591 (1904); Old Domin. S. S. Co. v. McKenna, 17 Abb. N. C. (N. Y.) 262 aff'd, 30 Fed. 48 (1887); People v. Davis, 159 App. Div. (N. Y.) 464 (1913).

¹²O. W. Holmes, "Privileges and Intent," 8 H. L. R. 1, and opinions in Vegelahn v. Guntner, *supra*; Plant v. Woods, 176 Mass. 492 (1900), still adhered to in Coppage v. Kansas, 236 U. S. 1, 27 (1915).

the conditions under which the acts of a boycotting combination may become justifiable. "The moral and legal character of acts depends on the end sought and the accompanying motive and intent."¹³ "Intent is used to denote the immediate object aimed at by the doer of the act. Motive is used, not to signify the object or result immediately aimed at, but the cause for entertaining the desire."¹⁴ Courts even within a single jurisdiction are inclined to differ in estimating the relative importance of these two elements.¹⁵ In New York, for example, it was declared in the case of *Mills v. U. S. Printing Co.*:¹⁶ "Where the result sought by the boycott is to protect the members of the combination, or to enhance their welfare, the loss is but the incident of the act whereby the ultimate end is gained * * and when it accomplishes its purpose 'without violence or other unlawful means' but simply by abstention, I think that it cannot be said that 'to boycott' is to offend the law." Substantially similar utterances indicative of a liberal judicial attitude are to be found in other cases arising in New York,¹⁷ especially in the *Cummings case*,¹⁸ which, although involving a strike, is not logically distinguishable from the boycott cases in this particular. The language of the principal case presents a decided contrast;¹⁹ "The *immediate purpose and intent*, and not the ultimate purpose or hope, of the defendants in instituting the boycott should be considered if the purpose of those who inaugurate the boycott bears upon its legality * *."

Although the position maintained in the principal case is reconcilable with the predominant American view, which finds no justification in a legitimate motive, it is apparently out of harmony with the perceptible trend of New York decisions. In unduly emphasizing the element of intent, and practically ignoring that of motive, it is submitted that the court has departed from the former liberal basis and assumed a rather narrow ground. An able writer, after an exhaustive examination of the cases, concludes:²⁰ "Given a competi-

¹³Newton v. Erickson, *supra*, p. 295; see also Fink v. Butchers' Union, 95 Atl. (N. J.) 182 (July, 1915).

¹⁴Jeremiah Smith, "Crucial Issues in Labor Litigation," 20 Harv. L. R. 451, 453.

¹⁵Compare conflicting opinions in Nat. Prot. Ass'n v. Cummings, *supra*; Bossert v. United Brotherhood, 77 Misc. (N. Y.) 592 (1912) and Newton v. Erickson, *supra*; Allen v. Flood, L. R. 1898 A. C. (Eng.) 1, and Quinn v. Leathem, *supra*.

¹⁶99 App. Div. (N. Y.) 605. Italics are writers.

¹⁷Gill Engrav. Co. v. Dorer, 214 Fed. 111 (1914); Nat'l Fireproof Co. v. Builders' Ass'n, 169 Fed. 259 (1909); Bossert v. United Brotherhood, *supra*; Butterick Pub. Co. v. Union No. 6, 50 Misc. (N. Y.) 1, (1900); Reynolds v. Plumbers' Ass'n, 30 Misc. (N. Y.) 709 (1900), *aff'd*, 53 App. Div. (N. Y.) 650; People v. Radt, 15 N. Y. Cr. R. 174 (1900).

¹⁸Nat. Prot. Ass'n Cummings, 170 N. Y. 315, 328-331.

¹⁹89 Misc. (N. Y.) 501, 510. Italics are writer's.

²⁰E. W. Huffcut, "Interference with Contracts and Business in New York," 18 Harv. L. R. 423, 443.

tive struggle in the large sense between the plaintiff and the defendant, and an interference by persuasion with the plaintiff's contracts for the purpose of securing to the defendant a substantial and not too remote advantage in that competition, the end will be held to justify the means. Motive, therefore, in the sense in which the term is used here, must continue to be an important element in the decision of cases dealing with the interference with contracts and business by persuasion and its incidental aids."

What are the legitimate implications and conclusions to be drawn from the decision in the *Wardell* case? *First, as affecting substantive rights.* Although the precise question involved still remains open as far as the Court of Appeals is concerned, it probably indicates the ultimate judicial attitude toward the peaceful secondary boycott in this state, thereby accentuating the need for legislative intervention. The New York court virtually adopts the doctrine enunciated by the United States Supreme Court in the Danbury hatter's case, *Loewe v. Lawlor*, *supra*. No consideration is given to whether the validity of that doctrine has been impaired by the recently enacted Clayton Law.²¹ In this connection the opinion of an eminent authority is enlightening.²² "It is therefore apparent that the labor organizations have secured a statutory reversal of the principles of the decision in the Danbury hatter's case, and the legalization of the boycott as a lawful instrument to insure the dominance of organized labor." Nor does the court consider whether present-day industrial conditions sanction the abrogation of an eighteenth century doctrine.²³ *Secondly, as affecting procedural rights.* In granting an injunction the court recognizes the propriety of equitable relief, a doctrine supported by high authority,²⁴ although the object of severe criticism.²⁵ No doubt the Clayton Law has substantially limited the application of the injunction to boycott cases, "and therefore labor organizations in the future may use the boycott as a weapon in a dispute between employer and employees without danger of interference by injunction or liability in damages * * *"²⁶

Alexander M. Hamburg, '16.

Wills: Manner of Execution: Signing "at the end of the will."—*Matter of Talbot*, 91 Misc. (N. Y.) 382 (1915), presents again the question as to the proper interpretation of the statutory provision

²¹Act of July 2, 1890 (26 Stat. L. 209), as amended by Act of Oct. 15, 1914, sec. 6.

²²George W. Wickersham, "Labor Legislation in the Clayton Act," republished from the Alumni Reg. Univ. of Penn. in *The American Federationist*, July, 1915, p. 498.

²³See Final Report, Commission on Industrial Relations, pp. 136, 382-87: supported in notes, 28 Harv. L. R. 698 (May, 1915) and 29 Harv. L. R. 86 (Nov. 1915).

²⁴In *re Debs*, 158 U. S. 564 (1895); *Davis v. Zimmerman* 91 Hun (N. Y.) 489 (1895).

²⁵Final Rep. Commission on Industrial Relations, p. 63; *Gill Engrav. Co. v. Doerr*, *supra*.

²⁶G. W. Wickersham, *op. cit.*, referring to sec. 20, Clayton Law.

that no will shall be valid unless "it shall be signed by the testator at the end of the will."¹ The alleged imperfection in the will was the addition of the words "Burlington, N. Y., Dec. 15, 1914," placed below the testator's signature by the physician who drew the instrument. The surrogate held that this addition was no part of the will, since it was unnecessary and did not condition the disposing provisions, and that the will had been signed at the end.

But in the course of his opinion the surrogate made this statement:² "It must be recognized as established by the courts in this state that a will must be signed at the physical end of the instrument to make a valid will." The declaration was purely *obiter*, but it is submitted that this is no longer a correct pronouncement of the New York law upon the point.

Under the statutes in force prior to 1830, if the testator in any portion of the will wrote his name with the intent thereby to sign the instrument, there was sufficient signing within the meaning of the statute.³ But numerous scandals having arisen through the misuse of this liberality, the statute in its present form was enacted to prevent unauthorized and fraudulent additions.⁴ By requiring the name to be at the end, neither the testator nor a wrongdoer might, after the formal execution of the document, add any material testamentary clause. And lest carelessness on the part of the testator should defeat the purpose of the law, the courts insisted that, whenever any question arose as to whether a will was signed at the end, the intent of the legislature, and not that of the testator, should govern.⁵ But, what was the legislative intent? How strictly was the statute to be construed?

In the early cases two answers, fundamentally different, were offered. In *Sisters of Charity v. Kelley*⁶ appears the following quotation: "Can we say that the end of a will has been found until the last word of all the provisions of it has been reached? To say that where the name is, there is the end of the will, is not to observe the statute. That requires that where the end of the will is, there shall be the name. It is to make a new law to say that where we find the name, there is the end of the will. The instrument offered is to be scanned, to learn where is the end of it as a completed whole, and at the end thus found must the name of the testator be sub-

¹New York Decedent Estate Law, sec. 21.

²91 Misc. (N. Y.), at page 386.

³For a discussion of this point, see *Watts v. Public Administrator*, 4 Wend. (N. Y.) 168 (1829); 1 Paige's Chanc. 347 (1829).

⁴*Matter of Kerr*, 2 Brad. Surr. (N. Y.) 244, 256 (1863); *Matter of O'Neil*, 91 N. Y. 516, 520 (1883); *Younger v. Duffie*, 94 N. Y. 535, 539 (1884); *Matter of Conway*, 124 N. Y. 455, 457 (1891); *Matter of Fults*, 42 App. Div. (N. Y.) 593, 595 (1899); *Matter of Gibson*, 128 App. Div. (N. Y.) 769, 773 (1903), appeal dismissed, 195 N. Y. 466 (1909).

⁵*Matter of O'Neil*, 91 N. Y. 516, 521 (1883); *Matter of Blair*, 84 Hun (N. Y.) 581, 585 (1895), affirmed without opinion, 152 N. Y. 645 (1897); *Matter of Gedney*, 17 Misc. (N. Y.) 500, 503 (1896); *Matter of Fults*, 42 App. Div. 593, 594 (1899); *Matter of Conway*, 124 N. Y. 455, 462 (1891); *Matter of Whitney*, 153 N. Y. 259, 264 (1897); *Matter of Andrews*, 162 N. Y. 1, 5 (1900).

⁶97 N. Y. 409 (1876).

scribed." How could the court more plainly express its intent to read through the instrument in the order in which it had been written by the testator, as that order appeared by the instrument itself, and at that point where he stopped in the consecutive order of composition,—that is, at the natural, literary, speaking end, to find the statutory end?

Yet seven years later we find in *Matter of O'Neil*⁷ these words: "The will (in the *Sisters of Charity* case) was denied probate because in the execution thereof the testator did not conform to the provisions of the statute, in failing to place his signature at the physical end of the will."

At first glance these rules may seem in accord, and, since in the actual cases either test might have been applied with the same result, perhaps such was the intent of the court in the later case. But unfortunately the court failed to foresee that cases might arise in which the physical and literary ends of the will would be entirely separate and distinct,—as, for instance, where a will is written in an ordinary letter form, on the first page, then continued to the third, then back to the second, where it ends, and where the testator naturally signs, and the court failed to appreciate that, applied to a case of this kind (no question of fraud being involved), the arbitrary "physical end" test would be unnecessary and unjust. But the courts in still later cases were equally culpable in that they also applied the rule to cases which were beyond its legitimate scope.

The "physical end" test is by no means invariably too narrow. If the case is one where the testamentary clauses preceding the signature in point of space constitute in and of themselves an apparently complete testamentary instrument, but there follow the signature in point of space material testamentary clauses written in consecutive order of composition after the clauses preceding the signature, but before the signature in point of time, the clauses after the signature having no contextual relation to the apparently complete will before the signature, the application of either rule is the same,—the "physical end" and the "end as a completed whole" are identical. And this was evidently the particular danger against which the legislature intended to guard,—a testamentary clause, preceded by the signature, and followed by a blank space, so that there would be no security against the addition thereto of any provision which the person in possession of the paper might be tempted to make. It is only reasonable that to such cases the law should be strictly applied.

The same question may arise where we have the attempted incorporation of that part of the instrument which follows the signature in point of space, through some reference in, or connection with, the body of the will. In *Matter of O'Neil, supra*, the testator wrote his will upon a four page blank. At the bottom of the third page were printed lines for his signature. He covered the first, second, and third pages with writing, and, as was natural, continued upon page four, but wrote only eight or ten lines upon it, leaving

⁷91 N. Y. 516 (1883).

a blank space of two-thirds of a page below. He then turned back to the third page and signed his name. It is obvious that the same danger arises here as in the case of a material but unconnected portion following for the draftsman of the will has two-thirds of a page to fill as his interests dictate. It is also apparent that the test laid down in the *Sisters of Charity* case, *supra*, would have been entirely satisfactory, and the court bases its decision upon that authority, but unhappily it attempts an unnecessary refinement of the rule and the "physical end" test is advanced.

It seems probable that this restatement of the rule was responsible for the holding in *Matter of Conway*,⁸ the next case. Here the will was written upon a single unfolded sheet. The front was covered with dispositive clauses, and below the last one appeared "carried to back of will." At the top of the reverse side was the word "continued." Then followed the remainder of the will, and, immediately at the end, the words "signature on face of the will." The signature was at the bottom of the first page in the printed lines left for it. Under the "physical end" test this was clearly invalid and was so held by a court divided four to three. The form of the instrument as a "completed whole" was entirely ignored. Although there was no allegation of fraud, the court was alarmed lest the words "carried to back of will" should have been inserted after the execution of the instrument.⁹ In effect, though not in words, they *presumed illegality* in a transaction the good faith of which had not been impeached. Ignoring this presumption as contrary to the fundamental principles of American jurisprudence, there is a clear connection between the matter upon the face of the instrument and before the signature, and the remaining clause which appears upon the reverse side and after the signature in point of space. So far the facts are like those in *Matter of O'Neil*, *supra*. But the two cases are to be distinguished because here the words "signature on face of the will" insure against later additions, show the testator's intent to comply with the statute, and may be said to connect the signature with the end of the instrument. But for the convenient statement of an arbitrary and narrow rule in the preceding case, it is difficult to see how the court could have held this will invalid.

The true superiority of the *Sisters of Charity* rule appears when we consider the effect of the "physical end" doctrine upon cases where the order of pagination is involved. *Matter of Whitney*¹⁰ is the earliest illustration. The will was in the following form: Subdivisions marked "First" and "Second" were written upon the face of a single sheet blank. Below these provisions was "See annexed sheet." Upon separate sheets were sub-divisions numbered "Third" and "Fourth," and these were fastened by removable metal staples

⁸124 N. Y. 455 (1891).

⁹It shows a curious inconsistency in the New York courts that a will with a blank space between the end of the dispositive clauses and the signature should be held valid for fraudulent additions could easily be made. But see *Matter of Gilman*, 38 Barb. (N. Y.) 364 (1862); *Hitchcock v. Thompson*, 6 Hun (N. Y.) 279 (1875); *Matter of Sanderson*, 9 Misc. (N. Y.) 574 (1894).

¹⁰153 N. Y. 259 (1897).

directly upon the face of the blank and over the clauses "First" and "Second." The court held that the will was not signed at the end. No attention was paid to the fact that no fraud was charged, or that natural common-sense would impel a man to read the provisions in their numerical order, as written, but the "physical end" doctrine was rigidly applied. Had the court but scanned the instrument as a completed whole, at the end thus found they would have discovered the name of the testator.

A case going even further in support of the *O'Neil* doctrine, and showing clearly the impropriety of a literal application of the "physical end" rule, is *Matter of Andrews*.¹¹ In this case a will was written upon a four page blank. One clause ended at the bottom of the first page. The next clause began at the top of page three, and to make it evident that the testator continued from one to three, skipping two, the third page was marked at the top "2d page." The writing filled that page, and a clause ended near the bottom. At the top of the actual second page, which was marked "3d page," commenced another clause, succeeding the last clause upon actual page three as the testator wrote them. The testator signed after the clauses on actual page two, which had, however, been marked "3d page." There was no charge of fraud. The opinion of the Appellate Division¹² is a convincing criticism of the "physical end" doctrine. The court pointed out that the early authority, *Sisters of Charity v. Kelley*, *supra*, held only that "the end of a will is not found until the last word of all the provisions of it has been reached," that this was the only practicable, consistent and just rule to adopt, and that in New York the remedy (the application of the "physical end" doctrine) had proved far worse than the disease (fraudulent additions to wills). What, they asked, would be the result if, after the execution of a will written upon separate sheets of paper, the sheets should be folded together in wrong order, so that the sheet last in fact and bearing the signature of the testator and witnesses is by mistake found out of place? Without attempting to answer this question they held themselves bound by precedent, but in effect expressed a hope that the Court of Appeals would modify the rule. But the Court of Appeals ignored these arguments and commended the doctrine of the *O'Neil* case most emphatically. The absence of fraud seemed to them immaterial. What the court desired was a fixed and definite rule, absolute in its application to all cases. And for twelve years this was the established doctrine in New York.¹³

¹¹162 N. Y. 1 (1900).

¹²*Matter of Andrews*, 43 App. Div. (N. Y.) 394 (1899).

¹³For other cases illustrative of the problems in the application of the statute previous to 1912, see *Matter of Kerr*, 2 Brad. Surr. (N. Y.) 244 (1853), clause appointing executor followed one signature, the other signature was separated from witnesses, signatures by a material testamentary clause; *Sisters of Charity v. Kelley*, 67 N. Y. 409 (1876), signature in middle of clause appointing executor; *Dennett v. Taylor*, 5 Redf. Surr. (N. Y.) 561 (1882), attempted incorporation of material testimony clauses following signature; *Matter of Jacobson*, 6 Dem. Surr. (N. Y.) 298 (1887), material testamentary clause following signature;

But in 1912 *Matter of Field*¹⁴ was decided by the Court of Appeals. A will was drawn upon a one sheet blank. The first blank in the printed form was filled with the name of the decedent. In the blank space of five or six inches and directly beneath the printed line reading, "First, after all my lawful debts are paid, I," the decedent wrote as follows, "will and direct that my estate be settled as per the provisions of the pages hereto attached and numbered from one to six inclusive. . . ." Immediately after these words in said blank space there were attached by two pins, six sheets in the handwriting of the decedent, numbered by him at the top consecutively from one to six, which contained the disposing provisions of the will. Below the pins was the remainder of the blank space, and at the bottom the signatures of the testator and witnesses. The court held the will valid. The Appellate Division,¹⁵ following *Matter of Whitney, supra*, and *Matter of Andrews, supra*, had treated the entire printed form as the first page, sheets one to six as the succeeding pages, and thus concluded that the will was not signed at the end. Says the Court of Appeals, "The physical position of the six sheets is. . . substantially ignored. The natural order of reading the paper is subverted, and an artificial order substituted, not to aid but to overturn the obvious intention. . . . Form should not be raised above substance in order to destroy a will." It is pointed out that the natural order of reading is to begin with the printed words, continue through to the point where the papers are attached, read these through consecutively, and then come to the signature at the bottom of the printed blank. In direct contradiction of the statements in the preceding cases, the court remarks that "the evil of fraudulent changes in wills is rare, while the evil of defeating wills altogether in the manner suggested is common. . . . The natural end of a will is where the draftsman stopped writing in the consecutive order of composition. . . . The will before us, when read consecutively as the mass of mankind would read it, has the signature at the natural and physical end thereof." Thus, after a lapse of twenty-four years the Court of Appeals returned to the doctrine of *Sisters of Charity v. Kelley, supra*, that the end of a will is its end as a "completed whole."

It is true that the *Field* case attempts to distinguish upon their particular facts the earlier, conflicting decisions, but the weakness of this distinction is clearly pointed out in *Matter of Peiser*.¹⁶ This

Matter of Nies, 13 N. Y. St. Rep. 756 (1887), clause appointing executor following signature; *Matter of Blair*, 84 Hun (N. Y.) 581 (1895), affirmed without opinion 152 N. Y. 645 (1897), same; *Matter of Sanderson*, 9 Misc. (N. Y.) 574 (1894), same; *Matter of Gedney*, 17 Misc. (N. Y.) 500 (1896), same; *Matter of Fults*, 42 App. Div. (N. Y.) 593 (1899), separate sheet attached to face of blank; *Matter of Donner*, 37 Misc. (N. Y.) 57 (1902), signature on second page, writing on third; *In re Diehl*, 112 N. Y. Supp. 717 (1908), material testamentary clause following signature; *Matter of Gibson*, 128 App. Div. (N. Y.) 769 (1908), marginal clause extending below signature, held *not to invalidate* the will, because the clause was unnecessary; and see discussion in same case, 195 N. Y. 466 (1909).

¹⁴204 N. Y. 448 (1912).

¹⁵*Matter of Field*, 144 App. Div. (N. Y.) 737 (1911).

¹⁶79 Misc. (N. Y.) 668 (1913).

is a case similar to *Matter of Andrews*, *supra*, except that here the changes from the first to the fourth, and from the fourth back to the second page, came in the middle of sentences, so that, if one read the first page and then the second, the context had no meaning, since the last sentence on the first page was concluded on the fourth. The will was held valid, and the language of the surrogate is illuminating as indicating the changes in the New York doctrine. To quote from his opinion: "Had it not been for the decision of the Court of Appeals in *Matter of Field*, 204 N. Y. 448, I should have no hesitation in holding that prior decisions in this state compelled me to conclude that the paper propounded was not signed at the end thereof within the meaning of the present Statute of Wills. . . . Although in principle these cases are often attempted to be distinguished by reason of some special features peculiar to each case, I confess I am utterly unable to distinguish this case before me from the principle of those decisions. Those decisions place form above substance. But *Matter of Field* modified this rule. . . . It is a very trifling conception of the doctrine of *stare decisis* to affirm that it applies only when the identical facts are again shown and the court must render a precisely similar judgment. . . . The doctrine of *stare decisis* relates to legal principles, not to facts. . . . The principle of the adjudication in this state prior to the year 1912 was that our Statute of Wills required a will to be subscribed by the testator at the physical or actual end or foot of the testamentary instrument. . . . The judgment in *Matter of Field*. . . makes the end of the will not the physical end only, but the logical or speaking end of the instrument, as actually written. . . . Such, I think, is the principle of the decision of *Matter of Field*, under the true doctrine of *stare decisis*, before noticed."

Whether the surrogate has correctly enunciated and applied the doctrine of *Matter of Field*, time and the Court of Appeals alone will tell. But from the standpoint of reason, justice, and necessity, it would seem that the two cases *Matter of Field*, and *Matter of Pieser*, interpret the statute strictly enough for the prevention of fraud. It has never been thought possible to apply the statute absolutely literally, else a signature in the body of the attestation clause could never have been held valid. A signature *after* an attestation clause may be held to incorporate the entire clause in the will,¹⁷ but a signature in the middle of it is at the "end" of nothing, and yet such wills are held to be signed at the end within the statute.¹⁸ Since, then, a literal compliance is impracticable, and since the early tendency to search for defects has been criticized so severely, it is reasonable to expect that the Court of Appeals will hereafter follow the common-sense view of *Matter of Field*, as interpreted by *Matter of Pieser*, and that the statute will be deemed to be complied with whenever the signature appears at the "logical," as distinguished from the "physical," end of a will.

Kenneth Dayton, '17.

¹⁷*Matter of Acker*, 5 Dem. Surr. (N. Y.) 19 (1887); *Matter of Noon*, 31 Misc. (N. Y.) 420 (1900); *Matter of DeHart*, 67 Misc. (N. Y.) 13 (1910).

¹⁸*Younger v. Duffie*, 94 N. Y. 535 (1884); *Matter of Kunkler*, 147 N. Y. Supp. 1094 (1914).